THE

REPORT

OF THE

CASE

BETWEEN

Thomas Forſey,

AND

Waddel Cunningham.

NEW-YORK:

Printed by JOHN HOLT, in the Year 1764.

THE

REPORT of an ACTION

OF

Assault, Battery and Wounding,

TRIED IN THE SUPREME

COURT of JUDICATURE

FOR THE PROVINCE OF

NEW-YORK,

In the TERM of OCTOBER 1764,

BETWEEN

Thomas Forsey, Plaintiff,

AND

Waddel Cunningham, Defendant.

NEW-YORK:

Printed by JOHN HOLT, in the Year 1764.

PREFACE.

AS it is not the Design of the following Sheets to cast the popular Odium on either of the Parties, but merely to expose the Attempt to obtain Redress in behalf of the Defendant, and in his Absence, against a legal Determination of the Suit, by a Method entirely new, unconstitutional and illegal; a particular Detail of the Evidence on both Sides is carefully avoided.

The strange and unnatural Construction which has been lately given to his Majesty's Royal Order, with a View to countenance the Appeal sought for in behalf of the Defendant, and the dangerous Tendency of such a Construction, are the Objects which the Editor has in View. This Construction must indeed be alarming to every British Subject; who, among the many invaluable Privileges, by which he is distinguished from the Subjects of other Princes, will naturally esteem a Trial by his Peers as one of the greatest --- In short it is a Construction which subverts the antient and fundamental Law of the Land, renders all Property in the Colonies precarious and of little Value, and the Method of obtaining Justice extremely dilatory, and extensively ruinous to the Litigants.

But to shew the pernicious Consequences of this Construction, Arguments need not here be urged ----- His Honour the Chief Justice has, in the legal Discharge of his important Trust, assigned such Reasons, as must be sufficient to expose the false and pernicious Doctrine, that the Crown by its Instruction designed to change the Laws of the Land, or to execute Justice by other Means than are known in the Mother Country.

As

As ſuch of the Proceedings in this Cauſe as are here ſubmitted to the public Scrutiny. were had in the King's Courts of Juſtice; The Editor thought it his Duty, to improve the Opportunity which the Law gives him, of commanding authenticated Copies, to communicate them to the World. By this Means, as well thoſe who are entitled to enjoy, as thoſe whoſe Duty it is to protect them in the Poſſeſſion of, their invaluable Rights and Privileges, may be appriſed of this unexampled Attempt to divert the Channel of Juſtice.

Thomas Forſey,

againſt

Waddel Cunningham.

Report of an Action of Aſſault, Battery and Wounding, tried in the Supreme Court of New-York, October 1764.

THIS Suit was brought for a violent Aſſault, Battery, and Wounding, committed by the Defendant on the Plaintiff, on the 28th Day of July 1763. The Chief Juſtice, on a Petition and Affidavit of the Violence of the Battery, gave his Order for holding the Defendant to Bail, in £.5000.

Upon the Return of the Writ in October Term 1763, the Plaintiff declared, in the uſual Form; and after an Imparlance to January Term following, the Defendant pleaded the general Iſſue, Not Guilty.

In April Term 1764, the Defendant moved the Court for a ſtruck Jury, which Motion was granted, and a Jury was accordingly ſtruck during the Term.

In October Term following, the Cauſe came on regularly, to be tried by the Jury that had been ſtruck at the Defendant's Requeſt.

The

The Trial laſted near twelve Hours, in the Courſe of which, the Proof of the Battery was ſo full and clear, that the Defendant relied only on ſome Evidence in Mitigation of Damages, in the Production of which, the fulleſt and faireſt Scope was given to him.

There were three Gentlemen, of Council for the Plaintiff, and four for the Defendant ; the Witneſſes on both Sides were very fully and circumſtantially examined, and the Evidence as fully and circumſtantially ſummed up by the Council, for both Parties : The Jury went from the Bar late in the Evening, and returned to it the next Morning with their privy Verdict ; by which they found the Defendant Guilty of the Treſpaſs, Aſſault, Battery and Wounding charged in the Plaintiff's Declaration ; and aſſeſſed the Plaintiff's Damages, at one thouſand five hundred Pounds, and his Coſts at ſix Pence.

On Saturday, the laſt Day of the Term, the Defendant's Council moved the Court, to ſet aſide the Verdict, for the Largeneſs of the Damages ; but the Court conceiving that the Damages were not exceſſive, rejected the Motion, and ordered Judgment to be entered for the Plaintiff. The Defendant being abſent beyond Sea, Robert R. Waddel who acts for him under a Letter of Attorney, then came up to the Bench ; and preſented to the Judges, a Petition to admit an Entry of an Appeal to the Governor and Council, and a Bond with Security, as grounded upon the Inſtruction. The Court ſuffered no Entry to be made, and returned the Papers ; declaring no ſuch Appeal would lie, and that the Inſtruction was not deſigned to favour any other, than a Removal by Writ of Error—The Inſtruction is in theſe Words.

" Our Will and Pleaſure is, that you or our Commander in Chief of our ſaid Province for the Time being, do in all civil Cauſes on Application being made to you, or the Commander in Chief for the Time being for that Purpoſe, permit and allow Appeals from any of the Courts of common Law in our ſaid Province, unto you or the Commander in Chief, and the Council of our ſaid Province ; and you are for that Purpoſe to iſſue a *Writ *in the Manner which has been uſually accuſtomed*, returnable before yourſelf and the Council of our ſaid Province, who are to proceed to hear and determine ſuch Appeal ; wherein ſuch of our Council as ſhall be at that Time Judges of the Court, from whence ſuch Appeal ſhall be ſo made to you our Captain General, or to the Commander in Chief for the Time being, and to our ſaid Council as

* No other than a Writ of Error, has ever been until the preſent Inſtance, iſſued in this Province.

as aforesaid, shall not be permitted to vote upon the said Appeal; but they may nevertheless be present at the hearing thereof, to give the Reasons of the Judgment given by them in the Causes wherein such Appeals shall be made. Provided nevertheless that in all such Appeals, the Sum or Value appealed for, do exceed the Sum of three hundred Pounds Sterling, and that Security be first duly given by the Appellant, to answer such Charges as shall be awarded, in Case the first Sentence be affirmed; and if either Party shall not rest satisfied with the Judgment of you or the Commander in Chief for the Time being and Council as aforesaid, Our Will and Pleasure is, that they may then appeal unto us in our Privy Council; Provided the Sum or Value so appealed for unto us, exceed five hundred Pounds Sterling, and that such Appeal be made within fourteen Days after Sentence, and good Security given by the Appellant, that he will effectually prosecute the same, and answer the Condemnation; as also pay such Costs and Damages as shall be awarded by us in Case the Sentence of you or the Commander in Chief for the Time being and Council, be affirmed: Provided nevertheless, where the Matter in Question relates to the taking or demanding any Duty payable to us, or to any Fee of Office or annual Rent, or other such like Matter or Thing, where the Rights in *Futuro* may be bound, in all such Cases you are to admit an Appeal to us in our Privy Council, though the immediate Sum or Value appealed for, be of a less Value, and it is our further Will and Pleasure, that in all Cases where by your Instructions you are to admit Appeals to us in our Privy Council, Execution be suspended until the final Determination of such Appeals, unless good and sufficient Security be given by the Appellee, to make ample Restitution of all that the Appellant shall have lost by Means of such Judgment or Decree, in Case upon the Determination of such Appeal, such Decree or Judgment should be reversed, and Restitution awarded to the Appellant."

A true Copy, examined by
Gw. BANYAR, D. Cl. Con.

A few Days after, the Costs *de Incremento* were taxed, and Judgment signed by Mr. Chief Justice; but before finishing the Taxation, he was served with an Instrument in writing, under the Great Seal of the Colony, in the Words following.

GEORGE the Third, *by the Grace of* GOD, *of Great-Britain, France and Ireland, King, Defender of the Faith, &c. To our Chief Juſtice and other our Judges of our Supreme Court of Judicature for our Province of New-York, in North America; and to all and every our Officers of the ſame Court, either Judicial or Miniſterial, and to every of them as well as to all others whom it may concern,* GREETING: *WHEREAS of our Royal Dignity and by our Inſtructions to our Captain General and Governor in Chief of our Province of New-York aforeſaid for the Time being,* ALL APPEALS *from any of our Courts of Law within the ſaid Province ſhould be heard and determined before our ſaid Governor and Council*; and now, *on the Part of* Waddel Cunningham, *againſt whom a Verdict was given in a Plea of Treſpaſs and Aſſault, at the Suit of* Thomas Forſey, *at our Supreme Court, holden for our ſaid Province of New-York, the Twenty ſixth Day of Octo. Inſtant; we command you and every of you, therefore, that you and every of you, wholly forbear proceeding or taking any Step further againſt the ſaid* Waddel Cunningham, *on the ſaid Verdict, until the Cauſe and Merits thereof be heard before our Governor and Council of the Province of New-York aforeſaid, (agreeable to, and in Conformity with our ſaid Royal Inſtructions as aforeſaid, bearing Date the Sixth Day of July, one thouſand ſeven hundred and ſixty-one, in the firſt Year of our Reign) as you will anſwer the ſame at your Peril; nor ſhall you in any wiſe omit acquainting him the ſaid* Thomas Forſey *herewith, returnable in Fourteen Days from the Date hereof, before our Governor and Council at Fort George, in the City of New-York, in our Province of New-York aforeſaid, where you ſhall then have this Writ.* WITNESS *the Honourable* CADWALLADER COLDEN, *Eſq; at our Fort in New-York aforeſaid, the thirty firſt Day of October, in the year of our Lord, one thouſand ſeven hundred and ſixty-four, and in the fifth Year of our Reign.*

A true Copy examined with the Original,

By GW. BANYAR, D. Cl. Con.

The Chief Juſtices proceeded to finiſh the Taxation, notwithſtanding the Service of this Inſtrument, and ſigned the Judgment. This Inſtrument was alſo ſerved on the Clerk of the Supreme Court, who in Conſequence thereof refuſed to ſeal the Plantiff's Execution, which was tendered to him for the Purpoſe; and by this Means the Plaintiff is hitherto prevented from levying his Damages and Coſts. A few Days after,

after, another Inſtrument, under the ſame Seal, was ſerved on the Chief Juſtice, in the Words following.

GEORGE the Third, *by the Grace of GOD, of* Great-Britain, *France and Ireland, King, Defender of the Faith, &c, To our Chief Juſtice and other the Judges of our Supreme Court of Judicature, for our Province of* New-York, *in* North-America, *and to all other the Officers of our ſame Court, whom it ſhall or may concern,* GREETING: *WHEREAS by our Writ to you, and every of you directed, we lately commanded you, that all further Proceedings ſhould be ſtay'd on the Verdict, obtained againſt* Waddel Cunningham, *at the Suit of* Thomas Forſey, *on a certain Plea of Treſpaſs and Aſſault, tried by the Jurors of our Sovereign LORD, the now King, at our laſt Supreme Court, holden for our Province aforeſaid, until the Merits and Matter thereof ſhould be heard before our Governor and Council of our ſaid Province, for the Time being, (agreeable to our Royal Inſtructions, in the ſaid Writ mentioned) on the Appeal of the ſaid* Waddel Cunningham; *in Conſequence whereof, and for the fully enabling our ſaid Governor and Council, to determine the Matter of the ſaid Verdict; We further command and ſtrictly enjoin you, and every of you, that laying aſide all other Matters and Things whatſoever, you cauſe all and every the Proceedings againſt the ſaid* Waddel Cunningham, *whether by Bill, Plaint, or otherwiſe, whereon the ſaid Verdict was obtained, to be brought before our ſaid Governor and Council, at* Fort-George, *in our City of* New-York, *and Province aforeſaid, at the Return of the ſaid Writ, being the fourteenth Day of this Inſtant* November, *as you will anſwer the Neglect at your Peril; and that you have then there this Writ, returnable on the ſame Day, and at the ſame Place.* WITNESS *the Honourable* CADWALLADER COLDEN *Eſquire, our Lieutenant Governor, and Commander in Chief of our Province of* New-York *aforeſaid, the ſecond Day of* November, *in the Year of our Lord, one thouſand ſeven hundred and ſixty four, and in the fifth Year of our Reign.*

The Chief Juſtice, on the Day mentioned for their Return, delivered the two Inſtruments to the Lieutenant Governor and Council, and aſſigned his Reaſons for not returning them in Form, and requeſted Time

to reduce thoſe Reaſons to writing, which he afterwards delivered in, to the Governor and Council.

But that they may have their proper Weight, it ſeems expedient to prefix to them the Oath which the Judges take at the Time of their Appointment, which is in theſe Words.

YE *ſhall ſwear, that well and lawfully ye ſhall ſerve our* LORD *the King and his People, in the Office of Juſtice, and that lawfully ye ſhall counſel the King in his Buſineſs, and that ye ſhall not Counſel nor aſſent to any Thing which may turn him in Damage or Diſheriſon by any Manner, Way, or Colour, and that ye ſhall not know the Damage or Diſheriſon of him, whereof ye ſhall not cauſe him to be warned by yourſelf, or by other ; and that ye ſhall do equal Law and Execution of Right to all his Subjects, rich and poor, without having Regard to any Perſon ; And that you take not by yourſelf, or by other, privily, nor apertly, Gift, nor Reward, of Gold nor Silver, nor of any other Thing which may turn to your Profit, unleſs it be Meat or Drink, and that of ſmall Value, of any Man that ſhall have any Plea or Proceſs hanging before you, as long as the ſame Proceſs ſhall ſo be hanging, nor after, for the ſame Cauſe ; and that ye take no Fee, as long as ye ſhall be Juſtice, nor Robes of any Man, great or ſmall, but of the King himſelf ; and that ye give none Advice, nor Counſel to no Man, great nor ſmall, in no Caſe where the King is Party ; And in caſe that any of what Eſtate or Condition they be, come before you in your Seſſions with Force and Arms, or otherwiſe, againſt the Peace, or againſt the Form of the Statute thereof made, to diſturb Execution of the common Law, or to menace the People, that they may not purſue the Law, that ye ſhall cauſe their Bodies to be arreſted and put in Priſon ; and in Caſe they be ſuch that ye cannot arreſt them, that ye certify the King of their Names, and of their Miſpriſion haſtily, ſo that he may thereof ordain a convenable Remedy ; And that ye by yourſelf, nor by other, privily nor apertly maintain any Plea or Quarrel hanging in the King's Court, or elſewhere in the Country,* And that you deny to no Man common Right, by the King's Letters, *nor none other Man's, nor for none other Cauſe,* and in Caſe any Letters come to you contrary to the Law, that ye do nothing by ſuch Letters, *but certify the King thereof ; and* proceed to execute the Law---notwithſtanding the ſame Letters ; *and that ye ſhall do and procure the Profit of the King and of his Crown, with all Things*

where

where ye may reaſonably do the ſame; and in Caſe ye be from henceforth found in Default in any of the Points aforeſaid, ye ſhall be at the King's Will, of Body, Lands and Goods, thereof to be done as ſhall pleaſe him.

So help you GOD.

The above is a true Copy of the Oath adminiſtered to, and taken by the Judges of the Supreme Court of the Province of *New-York*, in *April*, 1763. Examined with the Records in Lib. Commiſſions, C. Page 250.

Examined this 1ſt *November*, 1764.

By Gw. BANYAR, D. Secr'y.

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The Steps taken on the Exhibition of the Chief Juſtice's Reaſons, and the Reaſons themſelves will appear, from the following Minutes of that Day.

At a *Council* held at *Fort-George*, in the City of *New-York*, on *Monday* the Nineteenth Day of *November*, 1764.

PRESENT,

The Hon. *Cadwallader Colden*, Eſq; Lieut. Governor, &c.

Mr. *Horſmanden*, | *Earl* of *Stirling*,
Mr. *Watts*, | Mr. *Apthorpe*,
Mr. *Walton*, | Mr. *Reade*.
Mr. *De Lancey*, |

Waddel Cunningham, againſt *Thomas Forſey*.

MR. Chief Juſtice read and delivered into the Court, his Reaſons for not making Return on the Writs iſſued in this Cauſe, and then withdrew. Which Reaſons were ordered to be entered, and are as follow:

REASONS

REASONS offered by *Daniel Horſmanden*, Eſq; Chief Juſtice of the Province of *New-York*, to his Honour the Lieutenant Governor and the Honourable His Majeſty's Council for the ſaid Province, againſt returning an Inſtrument under Seal, whereby all Proceedings on the Verdict lately obtained by the ſaid *Thomas Forſey*, againſt the ſaid *Waddel Cunningham* in the Supreme Court, are commanded to be ſtayed, and another Inſtrument under Seal, whereby the Juſtices of the ſaid Supreme Court are commanded to cauſe the Proceedings whereon the ſaid Verdict was founded, to be bro't before the Lieutenant Governor and the Council.

I beg Leave to perfix a State of the Proceedings between the Parties, not only, the more clearly to avail myſelf of thoſe Reaſons, but alſo, in Compliance with my Oath of Office, by which I am bound to certify the King's Majeſty, of the Proceedings, on which thoſe Inſtruments (which I conſider as Letters in Delay of Juſtice) are ſaid to be grounded.

On Wedneſday laſt, I brought into this Court thoſe Letters, and as both the Prohibition, and Command, appeared to me unwarrantable, I thought it my Duty to obey neither ; but to lay the Inſtruments before you, and to aſſign my Reaſons, for the Part I acted, on this new, and extraordinary Occaſion. —The Liberty you gave me to reduce the Subſtance of what I then offered to Writing, as it affords me an Opportunity, to expreſs myſelf with greater Perſpicuity, is an Indulgence, for which I return your Honour and the Council my hearty Thanks.

The Suit which occaſioned thoſe Letters to the Judges (for they are directed to us all) was an Action of Treſpaſs brought in the Supreme Court ; in which the Plantiff Forſey declared for an Aſſault, Battery, and wounding, to his Damage £.5000 ; upon which the Cauſe was at Iſſue on the Plea of not Guilty ; and the Jurors in the laſt Term of October, found for the Plantiff, and aſſeſſed his Damages at £.1500.

The Pannel conſiſted of a ſpecial Jury of Freeholders, ſtruck at the Defendant's Requeſt —— No Challenges were made to either of them— The Trial took up twelve Hours —— No Evidence that was offered, by either Party was refuſed to be admitted by the Court — All the Judges were upon the Bench ——The Plantiff had three, and the Defendant four Gentlemen attending as their Council ——The Proofs were largely

ſummed

ſummed up on both Sides; and the Bar, and Country, muſt unanimouſly declare, that the Trial was regular, and ſolemn; and conducted with the utmoſt Fairneſs and Deliberation.

On the 27ſt of the Month, tho' the laſt Day of the Term, on which no ſpecial Motions are made, the Council for the Defendant were indulged with a Motion for a new Trial. But no Reaſon being aſſigned, but a Complaint that the Damages were exceſſive (which did not appear to the Court to be well founded) and the Treſpaſs being very atrocious, and the Proofs clear, the Court over-ruled the Motion.

It affords ſtrong Ground of Preſumption that the Proceſs and Pleadings are regular, ſince no Writ of Error has been yet offered to us —— The Verdict of the Jury muſt therefore be the ſole Cauſe of Complaint; and Relief againſt that, is now expected from your Honours.

This ſeems to be founded upon an erroneous Interpretation of the thirty ſecond Inſtruction, given by his Majeſty to the Governor of this Province: A Conſtruction which I could not countenance, by an Obedience to the Letters ſent to me; for the following Reaſons,

I. Becauſe it ſuppoſes the Royal Order to aim at altering the antient and wholeſome Laws of the Land.

By the common Law of England the Trial of Facts is entruſted to the Jury; and the Power to declare the Law upon them, is committed to the King's Judges—Theſe are diſtinct Provinces; and the Limits between them guarded by invariable Uſage and the moſt inconteſtible Authorities—The Errors of the Judges may be corrected by ſuperior Judicatories; as for Inſtance, thoſe of the King's Bench in the Exchequer Chamber, and by the Houſe of Peers—But in all thoſe Removes, the Verdict of the Jurors ſuffers no Re-examination, but is final and deciſive:—This is the Law at Home.

The Supreme Court here proceeds in the Main, according to the Practice of the Courts at Weſtminſter; and the Common Law of England, with the Statutes affirming, or altering it, before a Legiſlature was eſtabliſhed here, and thoſe paſſed ſince ſuch Eſtabliſhment, expreſsly extended to us, with our legiſlative Acts (which are not to be repugnant to the Laws of England) conſtitute the Laws of this Colony: And tho' there are many Inſtances of Judgments, reverſed and affirmed,

in

in a Courſe of Error, before the Governor and Council, I do affirm, with the higheſt Confidence, that not one Verdict was ever re-examined by any ſuperior Judicatory in the Province.

An Attempt then to re-examine the Verdict of a Jury, is repugnant to the Laws, both of England and this Colony—This is well known to the Crown;—and to ſuppoſe that his Majeſty deſigned to change the Law, and that too in one of its moſt important Articles, is certainly abſurd, and being dangerous both to the Prerogatives of the Crown and the Liberty and Safety of the Subject; it is in my humble Opinion highly criminal to aſſert, that the King's Order has any ſuch Aim. Nor,

II. Is there any Shadow of Reaſon, from the Words of the Inſtruction, to countenance ſuch a bold Interpretation.

'Tis true, the Governor is to permit and allow Appeals from the Courts of common Law; and who can deny, but that in Common Speech, the bringing of a Writ of Error, as it carries the Cauſe from a lower to a ſuperior Tribunal, is an Appeal?—And ſurely that muſt be the beſt Explication, which ſatisfies the Term, without altering the Law; eſpecially if we conſider that the Royal Inſtructions, given before the Year 1753, adopted that very Term, as applicable to Caſes of Error, the Words of the former Inſtructions running thus: You are "*to allow Appeals, in Caſe of Errors, from any of the Courts of Common Law*" and that ſuch is the meaning of the Appeals mentioned in the preſent Inſtruction as it is underſtood by his Majeſty in Council, will appear from the caſe of *Gordon*——and *Lowther*, 2d Lord *Raymond* 1447. Add to this that the preſent Inſtruction, does itſelf refute the Interpretation upon which this Meaſure is founded; for you'll be pleaſed to obſerve,

1ſt. That the Truth is, that all the Appeals we have had (I except none) have been in Error, and proſecuted by Writs of Error, and it being his Majeſty's Pleaſure that the Governor upon Appeals ſhall "iſſue a Writ in the Manner which has been uſually "accuſtomed". No other Appeal, than by ſuch Writ, is directed.

2dly. The Judges of the Supreme Court, though Members of the Council, are forbid to Vote on the Deciſion above: for

for which I can assign no other Reason, than because they are supposed to have prejudiced the Cause, especially as Leave is nevertheless given them, to render the Reasons of their Judgment, as the Judges do in *England*, upon Error brought before the Peers. And as they are only Judges of the Law and not Triers of the Facts; these Clauses evidently imply, that the Appeal given, is only in Error, and not upon the Verdict of the Jury.

Besides this, numberless Objections against a contrary Construction may be drawn *ab Inconvenienti*,—Permit me to mention a few;

I. Who is ignorant that in the Courts of Common Law, the Evidence of the Witnesses to the Jury, is all *viva voce?*— It results therefore, that they can transmit nothing but a Transcript of the Record, which contains no Part of the Proofs—The Court above, remains then uninformed of the Facts upon which The Verdict was given, and cannot adjudge upon them without a Re-examination of the Witnesses; against that Attempt several Objections instantly occur.—I will hint at but two;

1st. The Cause must be made *Res integra:* For the Want of written Memorials of the first Evidence, renders it impossible to confine the Proofs above, to what they were in the first Production to the Jury. —And so the Trouble and Charge of the Trial to the Parties, Court and Country, were all to no Purpose,—And,

2dly. It tends to open a Flood-Gate to Perjury:—For both Parties being now appriſed of the Proofs which were secret 'till the first Trial, every Effort will be made to blacken the Character of the most material Witnesses, and to supply all former Deficiencies.

And from these Sources such Streams will flow, as would extort the Groans of all, who delight in the due Administration of Justice.

IIdly. The Appeal contended for, impeaches the Wisdom of our Law in that distinguishing Article of Trials by Jury; since all Verdicts in Causes above the Value of £.300 Sterling would be worse than in Vain.

IIdly. It will encourage a Spirit of Litigiouſneſs ; and introduce Idleneſs, to the Ruin of many Families, and the great Impoveriſhment of the Country.

IVthly. The Expence attending ſuch Appeals will be intolerable—As the Proofs before the Governor and Council muſt neceſſarily be reduced to Writing, to Form what *Civilians* call the *Apoſtella*, for the next Remove of the Cauſe to his Majeſty in privy Council ; It will follow, that according to their Uſage, there muſt alſo be Interrogatories, croſs Interrogatories, Examinations, and croſs Examinations, and the Production of Exhibits—And he that is acquainted with the Proceſs of the civil Law Courts, will readily agree, that the Evidence introduced on a common Law Trial, of Twelve or Twenty-four Hours, eſpecially, when Titles to real Eſtates are in Queſtion, and Deeds offered, will, if reduced to Writing, ſwell the *Apoſtels*, to a Size ſo enormous, that the Trouble and Charge of the Suit, will often ſurpaſs the Value of the Thing in demand. And it may be of Uſe to obſerve here, (as a farther Proof, that it was not the Object of the Inſtruction, to allow Appeals upon the whole Merits ;) that you have not Officers to tranſact the Buſineſs, that would thereby be introduced ; the Court of the Governor and Council, having neither a Regiſter, nor Examiner, to this Day, appointed by the Crown.

V. It would be impoſſible for thoſe Courts of Appeal to diſcharge the Duty to which they would in ſuch Caſe be obliged. —— The Governor and Council muſt ſit *de Die in Diem* all the Year round, for the Buſineſs of their Colony —— And how then can his Majeſty in privy Council, beſides attending to the arduous Affairs of his Kingdoms, examine all the tedious Complaints brought up from all the Provinces for his Royal Deciſion?

VI. To what an amazing Inſecurity and Danger muſt the Subject according to this Project, be reduced and expoſed ?

Let me ſpecify a few Inſtances ;

1ſt. As the Expence, ſo the Delays, will be infinite—How great then the Encouragement for Contention? What wrongful Poſſeſſor and debauched Tenant, will give up his unjuſt Defence ? What Treſpaſſer will pay the Damages of an injured Plantiff, when as in this Caſe, the

Death

Death of either Party is the perpetual Extinction, not only of the Suit depending, but the very Cauſe of Action? What Loſer will not appeal upon the bear Preſumption that the firſt Witneſſes againſt him may be dead, or abſent, on the new Trial?

2d. Witneſſes of good and bad Characters, will have, in Effect, equel Credit with the Judges; for they and thoſe by whoſe Teſtimony they are to be ſupported, or diſcredited, will all be unknown by the Judges, who are to pronounce upon their Evidence on Appeal.

3d. New Modes of introducing Proof will neceſſarily eſtabliſh new Rules relative to them; and as all ſpecial Laws, cannot be foreſeen nor provided for; the Subject will be tried by new Laws, and often by Laws unpromulged; or to ſpeak more properly, by the Dictate of Power without Law.

Theſe are ſome of the Reaſons which induce me to be of Opinion, that the King's Inſtructions do not countenance the Exerciſe of any Judicial Authority to reverſe the Verdict of a Jury:—And as they give me the fulleſt Satisfaction,—I ſhall forbear aſſigning any other, tho' there are many——The firſt is ſufficient for us, who ſit as Judges—The Law warrants no ſuch Letters, as thoſe which the Defendant ſued out, and delivered to me——We have taken the Oath, preſcribed by the Statute of the 18 of Ed. 3. and have ſworn "to deny no Man common "Right, by the King's Letters, nor none other Man's, nor for none "other Cauſe, but to proceed to execute the Law notwithſtanding the "ſame Letters."

Upon the whole therefore, I cannot avoid complaining of theſe Letters, as an unwarrantable Abuſe of the King's Name, and his Judges—He that ſued them out did it at his Peril, and ought to anſwer the Contempt.——They are not only againſt Law, but couched in Terms very diſreſpectful: We are commanded to obey at our Peril; and as an Outrage upon all the Rules of Decorum, one Part of the abject Duty injoined upon us is, to notify the Plantiff, *Forſey*, even of the Indignity offered us.

I have only to add, that as the Power of adminiſtring Juſtice, is one of the moſt important of all Powers, it ought not to be aſſumed without the cleareſt Authority—None of your Predeceſſors ever heard an Appeal from the Verdict of a Jury—My long Reſidence in the Colony, and Seat on the Bench, and at the Board of Council, have given me Opportunities for ſome conſiderable Experience; and I know of no

Attempt

Attempt 'till this, to bring ſuch an Appeal : And from the Refuſal of Counſel to ſupport the Defendant's Application, you may naturally conclude, that the whole Body of the Law conſider it as illegal ---Whether a ſingle Word in the Royal Inſtructions will warrant your aſſuming this great and important Power, I ſubmit to your own Deliberations ; not doubting but that many Objections will ariſe in your own Minds, which have been omitted by me, and might have been ſuggeſted by my Brother Juſtices, who are now unfortunately all out of Town.

19th November, 1764. DANIEL HORSMANDEN.

Whereupon a Motion was made, that the other Judges of the Supreme Court, to whom the ſaid Writs were alſo directed, might be deſired to give the Reaſons of their Conduct --- *Reſolved in the Affirmative* ; and the Reaſons of the Conduct of the other Judges, are hereby deſired to be given to this Court accordingly—And it being then moved that the Opinion of ſome of the Gentlemen of the Law might be deſired on the following Queſtion ;

Whether a Court can, by the Crown, be legally conſtituted in this Colony, to hear civil Cauſes, in a Way of Appeal, from a Common Law Court, according to the Courſe of the civil Law, upon the whole Merits, and re-examine the Evidence given to a Jury, and reverſe, or controul their Verdict ?

The Opinions of Meſſieurs *Livingſton*, *Smith*, jun. *Hicks*, *Scott*, and *Duane*, were deſired on the ſaid Queſtion ; and the ſaid Gentlemen, (except Mr. *Hicks* who was not preſent) in Court, ſeverally delivered their Opinion in the Negative.

Whereupon it was moved, that the Attorney General might deliver his Opinion, on this Queſtion ;—

Whether the Crown has by the Thirty-ſecond Inſtruction, conſtituted a Court in this Colony, to hear civil Cauſes, in a Way of Appeal from the Courts of Common Law, according to the Courſe of the civil Law, upon the whole Merits, and re-examine the Evidence given to a Jury, and reverſe or controul their Verdict ?

And the Attorney General being ordered to give his Opinion on the ſaid Queſtion, He declared he was of Opinion, the Crown meant by the Thirty-ſecond Article of its Inſtructions, to conſtitute the Governor and Council a Court of Errors, and not a Court of Appeals in the Latitude the Queſtion ſuppoſes.

A true Copy, examined by

GW. BANYAR, D. Cl. Con.

At

At a Council held at *Fort George*, in the City of *New-York*, on *Wedneſday* the Twelfth Day of *December*, 1764.

PRESENT,

The Hon. CADWALLADER COLDEN, Eſquire, Lieutenant Governor, *&c.*

Mr. WATTS,	Mr. APTHORPE,
Mr. WALTON,	Mr. READE,
Mr. DE LANCEY,	Mr. MORRIS.
Earl of STIRLING,	

Waddel Cunningham, againſt *Thomas Forſey*, } ON APPEAL.

A Letter from Mr. Juſtice *Jones* was read, informing his Honour the Lieutenant Governor, and the Gentlemen of the Council, that the Writs referred to in the Order, by which he is deſired to give the Reaſons of his Conduct, had not been delivered to him, nor had he ſeen any ſuch in the Hands of any other Perſon; and therefore, that it is impoſſible for any Man to give the Reaſons of his Conduct, in a Matter that never fell under his Conſideration: Whereupon it is the Opinion of this Court, that Mr. Juſtice *Jones* be deſired, and he is hereby deſired to give his Reaſons to this Court, on *Wedneſday* the 26th Inſtant, why the Appeal moved for in this Cauſe, in the Court below, was not allowed; or whether according to the Laws and Conſtitution of *England*, an Appeal from the Verdict of the Jury, on the whole Merits of this Cauſe, could lie? And it is ordered that a Copy hereof be ſerved on Mr. Juſtice *Jones*.

Then

Then Mr. Juſtice *Smith* was deſired, purſuant to the Requeſt in Council, of the 10th of *November* laſt, to give the Reaſons of his Conduct, &c.

Whereupon he ſpoke to the Effect following;

" THAT having been out of Town, on the 19th of *November* laſt, he had had no other Notice of the Requeſt in Council, than by peruſing a Copy of the Minute of that Day, atteſted by the Clerk; but being by his Seat in Council, obliged to aſſiſt in Government when called; and by his Office as Juſtice, to be of Council for the King, and accountable for his Conduct in the Supreme Court; he was willing, without any Delay, to Anſwer any Queſtion that might reaſonably and lawfully be propoſed to him. To this End, finding the Queſtion as connected with the preceding Matter ſo general, that were he to give his Anſwer in Terms as general as the Queſtion, he conceived he ſhould Diſappoint the juſt and reaſonable Expectation of this Honourable Court. Therefore, he had conſidered the Matter more at large, than would ſtrictly ſuffice to anſwer that Queſtion in the Terms propoſed; and hoped he was able to Anſwer immediately, any particular Queſtion upon the ſubject Matter then depending, relating to his Conduct in the Supreme Court.

" Whereupon the ſaid Juſtice was deſired by the Court, to give his Reaſons why he did not allow the Appeal in the Behalf of *Waddel Cunningham*, at the Suit of *Thomas Forſey*, from the Verdict in that Cauſe, to the Governor and Council, and Cauſe the ſame to be entered there as had been moved.

To which he anſwered:

" That the Appeal from the Verdict of a Jury, was what the Supreme Court could take no Notice of. Becauſe,

" FIRST, The Judges by their Commiſſion, were only conſtituted Judges of Law, and limitted in their Proceedings by the courſe of Practice, in three of the great Courts of Law at *Weſtminſter*, and no Appeal from any Verdict, taken in either of thoſe Courts, was ever known to have been allowed or entered there.

" To Evince this, he prayed that his Commiſſion might be read from the Record, which was accordingly read in the Words following, *to wit:*

GEORGE

GEORGE *the Third, by the Grace of* GOD, *of* Great Britain, France, *and* Ireland, *King, Defender of the Faith, and ſo forth. To our truſty and well beloved* William Smith, *Eſq*; GREETING: *We repoſing eſpecial Truſt and Confidence in your Loyalty, Learning, and Integrity; have aſſigned, conſtituted, and appointed, and we do by theſe Preſents, aſſign, conſtitute, and appoint you, the ſaid* William Smith, *to be our third Juſtice of our Supreme Court of Judicature, of and in our Province of* New-York *in* America; *giving, and by theſe Preſents granting, unto you the ſaid* William Smith, *full Power and Authority in our ſaid Supreme Court, to hear and determine all Pleas whatſoever, civil, criminal, and mixed, according to the Laws, Statutes, and Cuſtoms, of that Part of our Kingdom of* Great Btitain, *called* England, *and the Laws of our ſaid Province of* New-York, not being Repugnant thereto; *and Executions of all Judgments of our ſaid Court, to award; and to act and do all Things which any of our Juſtices of either Bench, or Barons of the Exchequer, in that Part of our Kingdom of* Great Britain, *called* England; *may or ought to do; and to make ſuch Rules and Orders in our ſaid Court, as ſhall be judged Convenient and Uſeful, and as near as may be, agreeable to the Rules and Orders of our Courts of King's Bench, Common Pleas, and Exchequer, in that Part of our Kingdom of* Great Britain *called* England. *To have and to hold the ſaid Office, and Place of third Juſtice, of our ſaid Supreme Court, of and in our ſaid Province of* New-York, *in* America; *with all and ſingular the Rights, Privileges, Advantages, Saleries, Profits, Fees, and Perquiſites, unto the ſaid Office of third Juſtice belonging, or in any Wiſe apurtaining, or which of Right ought to belong or appertain to the ſaid Office, in as full and ample Manner, as any third Juſtice of our ſaid Supreme Court, heretofore hath, or of Right ought to have enjoyed the ſame, to you the ſaid* William Smith, *for and during our Pleaſure. In Teſtimony whereof, we have cauſed theſe our Letters to be made Patent, and the great Seal of our Province of* New-York, *to be hereunto affixed.* WITNESS *our truſty and well beloved* Robert Monckton, *Eſq; our Captain General and Governor in Chief, in and over our Province of* New-York, *and the Territories depending thereon in* America; *Vice Admiral of the ſame, and Major-General of our Forces, by and with the Advice of our Council of our ſaid Province, at our Fort in our City of* New-York, *the ſixteenth Day of* March, *in the Year of our Lord, One Thouſand Seven Hundred and Sixty-three, and of our Reign the Third.*

CLARKE.

Upon

" Upon which Commiſſion, the ſaid Juſtice obſerved, that as he was conſtituted a Juſtice of the Supreme Court, and that the Power and Authority granted to him, was to hear, try, and determine, according to the Laws, Statutes, and Cuſtoms, of that Part of the Kingdom of *Great Britain* called *England*; it was plainly a Law Commiſſion, and that he was only authorized and empowered to award Executions of all Judgments of the ſaid Court, and to act and do, all Things which any of his Majeſty's Juſtices of either Bench, or Barons of the Exchequer, in that Part of the Kingdom of *Great Britain* called *England*, might or ought to do; and to make ſuch Rules and Orders in the ſaid Court, as ſhould be judged Convenient and Uſeful; and as near as might be, agreeable to the Rules and Orders of the Courts of King's Bench, Common Pleas, and Exchequer in *England*. But unleſs it did appear, that theſe Courts allowed Appeals from Verdicts taken in thoſe Courts, which he was very ſure they did not, he did not ſee it poſſible for the Judges of the Supreme Court of this Province to allow ſuch an Appeal in that Court, without doing what their Commiſſions would not Warrant. And upon this Commiſſion, limitting his Power to the Rules of the common Law, he grounded his firſt Reaſon, why he did not allow the Appeal from the Verdict, as prayed to be entered in the Supreme Court.

" The ſaid Juſtice alſo obſerved, as a ſecond Reaſon for his Conduct, that formerly it had been practiſed, that the Juſtices of the Supreme Court, who had held their Offices by like Commiſſion with his, had only been ſworn as to their Oath of Office, by ſuch general Words as theſe:

" *Ye ſwear, that you will well and truly execute the Office of a Juſtice* " *of the Supreme Court, according to the beſt of your Skill and Underſtand-* " *ing.* So help you God."

" But the Chief Juſtice, Mr. Juſtice *Livingſton*, and himſelf, being deſired to attend the Governor, to take the Oaths appointed by Law, and receive their Commiſſions, and being willing, (if they accepted thoſe Commiſſions) not to want any legal Qualification, and to give all the Security to his Majeſty and the People of this Province, which the Law required for the due Execution of the ſaid Offices, informed Governor Monckton, who diſliked that general Form, that there was a more extenſive Oath propoſed in the Books, and mentioned the Oath in the

18th of Ed. III. often referred to upon this Subject, which they produced, alledging, that it required ſome Explanation, and the concluding Words, which contained an *Invocation* (as uſed in the Church of *Rome*) *of the help of all Saints*, muſt be altered, becauſe their Religion as Proteſtants, and the Declaration enjoined by Law, declared ſuch Invocation to be *Superſtitious and Idolatrous*. The fixing and ſettling the Explanation, and the ſaid Alteration, took up three or four Days, and at length, it was taken with ſuch Explanation, as had been given and agreed to, according to the Words in the Book, which are alſo entered upon Record, which the ſaid Juſtice prayed might be read, which was Read accordingly, in the Words following, *to wit* :

YE *ſhall ſwear, that well and lawfully ye ſhall ſerve our* LORD *the King and his People, in the Office of Juſtice, and that lawfully ye ſhall counſel the King in his Buſineſs, and that ye ſhall not Counſel nor aſſent to any Thing which may turn him in Damage or Diſheriſon by any Manner, Way, or Colour, and that ye ſhall not know the Damage or Diſheriſon of him, whereof ye ſhall not cauſe him to be warned by yourſelf, or by other ; and that ye ſhall do equal Law and Execution of Right to all his Subjects, rich and poor, without having Regard to any Perſon ; And that you take not by yourſelf, or by other, privily, nor apertly, Gift, nor Reward, of Gold nor Silver, nor of any other Thing which may turn to your Profit, unleſs it be Meat or Drink, and that of ſmall Value, of any Man that ſhall have any Plea or Proceſs hanging before you, as long as the ſame Proceſs ſhall ſo be hanging, nor after, for the ſame Cauſe ; and that ye take no Fee, as long as ye ſhall be Juſtice, nor Robes of any Man, great or ſmall, but of the King himſelf ; and that ye give none Advice, nor Counſel to no Man, great nor ſmall, in no Caſe where the King is Party ; And in Caſe that any of what Eſtate or Condition they be, come before you in your Seſſions with Force and Arms, or otherwiſe, againſt the Peace, or againſt the Form of the Statute thereof made, to diſturb Execution of the common Law, or to menace the People, that they may not purſue the Law, that ye ſhall cauſe their Bodies to be arreſted and put in Priſon ; and in Caſe they be ſuch that ye cannot arreſt them, that ye certify the King of their Names, and of their Miſpriſion haſtily, ſo that he may thereof ordain a convenable Remedy ; And that ye by yourſelf, nor by other, privily nor apertly maintain any Plea or Quarrel hanging in the King's Court, or elſewhere in the Country*, And that you deny to no Man common Right, by the

King's Letters, *nor none other Man's, nor for none other Cauſe*, and in Caſe any Letters come to you contrary to the Law, that ye do nothing by ſuch Letters, *but certify the King thereof*; *and* proceed to execute the Law --notwithſtanding the ſame Letters; *and that ye ſhall do and procure the Profit of the King and of his Crown, with all Things where ye may reaſonably do the ſame; and in Caſe ye be from henceforth found in Default in any of the Points aforeſaid, ye ſhall be at the King's Will, of Body, Lands and Goods, thereof to be done as ſhall pleaſe him.*

" Upon which, it being obſerved by the Court, that the ſaid Oath was very extenſive and ſolemn, the ſaid Juſtice ſaid *it is ſo*, and that leſt thro' Surpriſe or Forgetfulneſs he might deviate from it, he found it neceſſary frequently to read it, eſpecially before the holding the Supreme Court, and on the Circuits; and obſerved, that as his Oath of Office, as well as his Commiſſion, reſpected only the common Law and its Proceedings, and could not admit him, by any poſſible Conſtruction, to decide or determine by any other Law; and as the common Law knew not of any ſuch Appeal from a Verdict to any other Court than that wherein it was taken, he held himſelf obliged by his Oath, to refuſe any Entry of the Appeal from the Verdict as offered, and that if he had allowed that Appeal, he ſhould have acted not only without Authority, but contrary to his Oath; for theſe Reaſons, he could not allow the Appeal as offered, and which he hoped would appear to be a full Anſwer to this Queſtion; adding therewith, if he had ſat in a Court of Admiralty, or any Court from whence Appeals are allowed to a ſuperior Juriſdiction, he ſhould doubtleſs upon Motion, have allowed them according to the Law and Practice of ſuch Courts."

After which, the ſaid Juſtice was deſired to give the Reaſons of his Conduct, with Regard to the Writs referred to in the Queſtion propoſed on the 19th of *November* laſt.

To which he anſwered:

" As to the firſt Writ directed to the Chief Juſtice, and other Judges of his Majeſty's Supreme Court, " commanding them, and every of " them, wholly to forbear Proceeding, or taking any Step further againſt " the ſaid *Waddel Cunningham*, on the ſaid Verdict, until the Cauſe " and Merits thereof be heard before the Governor and Council, *&c.*"

" The

" The ſaid Juſtice acknowledged that he had been duly ſerved with that Writ, and had compared the Copy thereof with the Original at the Time of Service; but as there had been no Application made to him in that ſaid Cauſe, to do any Thing in Conſequence of the ſaid Verdict, ſince the Service of the ſaid Writ, he had done nothing in it; but according to what he had heard, it was likely that the Validity or Legality of that Writ would come into Queſtion in the Supreme Court; therefore, he was in their Honours Opinion, whether it would be proper that at preſent he ſuſpend his Judgment on that Point, as extrajudicial Opinions ought to be given very ſparingly, and with great Caution, if at all, leſt in Conſequence of ſuch Opinion, Suits ſhould be promoted, Maintenance encouraged, and the Judgment of the Juſtice himſelf foreſtalled, and the Public otherwiſe receive ſome Damage.

" However, if the Court inſiſted upon his giving an Opinion on the Legality of that Writ, he was ready to give it: To which the Court agreed, that the Reaſon offered was ſufficient, why any Opinion at preſent on that Writ, ſhould not be deſired."

And then as to the ſecond Writ, reciting the former, and "Commanding " the Chief Juſtice, and other the Judges of the Supreme Court, that " they cauſe all and every the Proceedings againſt the ſaid *Waddel* " *Cunningham*, whether by Bill, Plaint, or otherwiſe, whereon the ſaid " Verdict was obtained, to be brought before the Governor and Coun- " cil, *&c.*

" The ſaid Juſtice declared, that he had not been ſerved with that Writ, and had only a Copy of it delivered to him; but underſtood that the Writ had been delivered to the Chief Juſtice, to whom Returns on Writs of Error do properly belong; and as that Honourable Board had heard the Chief Juſtice's Reaſons, why he did not make any Return of the Proceedings of the Supreme Court on that Writ, he alſo was in their Opinion, whether it was neceſſary for him to give his own Opinion concerning that Writ; but this *alſo* at preſent was not deſired."

Mr. Juſtice *Livingſton* then delivered his Reaſons in Writing, which were ordered to be entered, and are as follow:

"BEING deſired by your Honours, to give you the Reaſons of my Conduct, in refuſing to return two Inſtruments under Seal, directed to the Chief Juſtice, and the other Judges of the Supreme Court; by

by one of which, all Proceedings on a Verdict obtained by *Thomas Forsey*, against *Waddel Cunningham*, are commanded to be stayed; and by the other, for the more fully enabling the Governor and Council to determine the Matter of the said Verdict; we are further commanded, as we will answer the same at our Peril, to Cause all the Proceedings against the said *Waddel Cunningham*, to be brought before the Governor and Council.

" I beg Leave to observe, that my Conduct might easily be justified, by shewing that I had no Notice of those Letters, till the Chief Justice had refused to return them, after which no legal Return could be made, for a Writ must ever be returned by those to whom it is directed. But because I believe your Honours, in the Request you made us, did not intend so much to call upon us for a Justification of our Conduct, as to receive the Opinion of the Judges in an Affair of the greatest Importance, and to be informed whether in our Explanation of the Instruction on which those Instruments seem to be founded, we agree with the Chief Justice; I shall with the greatest Willingness endeavour to answer your Expectations.----Had the Chief Justice in the least doubted in what Manner he ought to have acted on the Receipt of th se Instruments, he would have waited till the Return of the other Judges out of the Country permitted a Consultation; but he thought, and it is by what I can learn the Opinion of every one of us, that the Case admitted no Dispute.

" For it is evident, that the Course of the Law, by which the Prerogatives of the Crown, and the Rights of the Subject, are defined and secured, must at all Times be free and uninterrupted; and this is so particularly provided for, that by the Oath we have taken, we are to deny no Man Right by the King's Letters, nor none other Man's, but to proceed notwithstanding such Letters. This was not intended however, to prevent the staying of Execution after Judgment, by Writs of Error; for the Correction of Errors is not a Delay, but a Furtherance of Justice.

" The first Instrument appears to me, a very great Abuse of the King's Name and Authority. It commands us in Terms very disrespectful, and not such as are usual in Writs directed to us, wholly to forbear Proceeding or taking any further Step against the said *Waddel Cunningham*, on the Verdict obtained against him. The Illegality of which will appear from these three Observations.

1st.

1ſt. It commands us not to do that, which the Law, our Duty, and common Juſtice to the Parties, oblige us to do; for had a Writ of Error been brought, we ſhould have ſtill been obliged to proceed to Judgment, and the ſigning of the Roll: And tho' it is allowable to bring Writs of Error before Judgment, this being the common Practice to prevent Execution, yet the Writ has no Effect till after Judgment; before that, the Party having received no Injury.

2dly. We are to forbear till the Merits of the Verdict are heard before your Honours; but the Roll being with us, and no proper Method being taken to bring the Cauſe before you; this Prohibition might for any Thing which could appear to the Judges, have been perpetual, to the great Grievance of the Party concerned, and the Delay of Juſtice. Therefore the Chief Juſtice could not have refuſed to ſign the Roll when it was required, notwithſtanding this Prohibition.

3dly. Your Honours are incompetent Judges of the Merits of the Verdict, becauſe it is impoſſible to inform you of the Grounds on which the Jury founded it, ſince they ſometimes are guided by what they know of their own Knowledge; eſpecially in what relates to the Characters of the Witneſſes, of which they coming from the Neighbourhood, are the moſt proper Judges.

" The other Inſtrument, as well as the firſt, is directed " to our " Chief Juſtice, and the other Judges of our Supreme Court, and to all " the other Officers of our ſaid Court, whom it may concern;" ſo that if we had made the Return required, we muſt have joined with all the Officers of the Court, or the Return would not have been good: Whether this be fit or decent, I leave to your Honour's Conſideration.

" But waving the Defects of Form, of which there are many others, I ſhall obſerve on the Purport and Deſign of this Inſtrument, and ſhew that it was impoſſible for us to make ſuch a Return as ſeems to be required. Previous to which, I ſhall make a few Obſervations on the Inſtruction on which it is founded.

" The Intention of this Inſtruction appears to me no more than a Direction to your Honours, when you ſhould ſuffer a Writ of Error to be brought, and when you are to diſmiſs the Cauſe. I have frequently read this Inſtruction on this Occaſion, and it amazes me to find that any

Perſon

Perſon ſhould think it liable to a different Explanation. What gives Ri
to the Conſtruction on which theſe Inſtruments are founded, is the frequen
Uſe of the Word *Appeal*; but how ſlender a Foundation this is, muſt appea
from the Inſtructions before the Year 1753, quoted by his Honour the Chie
Juſtice, which direct that you ſhall allow Appeals in Caſes of Error from
the Courts of Law; where the Word *Appeal* means nothing elſe bu
Writs of Error; and accordingly on all ſuch Appeals, Writs of Erro
have been brought. —— After this comes the Inſtruction in Queſtion, and
ſays, you ſhall allow Appeals from the Courts of common Law, only
in ſome certain Caſes, *to wit*, When the Value of the Thing appealed
for exceeds the Sum of *Three Hundred Pounds Sterling*. What can this
mean, but ſuch an Appeal as was meant by the former Inſtruction? and
in this Senſe it ſeems to have been underſtood by your Honours; other-
wiſe you would not have ſuffered it to be made a Queſtion, whether you
ought to take Cognizance of a Cauſe brought before you by Writ of
Error, when the only Objection was, that the Thing appealed for, did
not amount to *Three Hundred Pounds Sterling*: An Inſtance of this Kind
I was Witneſs to laſt *Wedneſday*; for if the Inſtruction muſt be under-
ſtood to relate to Appeals in the civil Law Form, Writs of Error
would have ſtood upon the ſame Footing they did before this Inſtruction
was given. In this Explanation and Acceptation of the Word, your
Honours are juſtified by the Uſe of it in common Parlance, and tho'
this be not frequent among Lawyers, yet it is ſome times ſo uſed. Dr.
Cowel in his *Interpretor*, on the Word *Appeal*, ſays it is uſed in the com-
mon, as in the civil Law, to ſignify the Removal of a Cauſe from an
Inferior Judge to a Superior; and his Honour the Chief Juſtice has
ſhewn you that it was ſo underſtood by the King in Council. —— The
Truth is, both in the civil and in the common Law, the Word is uſed
in theſe two Senſes, to ſignify an Accuſation, and an Appeal from a
Judgment; but as in the common Law, (which is more particular in
it's Diſtinctions than any other) there are four Methods of Appeal from
a Judgment, *to wit*, By Writ of Error, Writ of falſe Judgment, Writ
of Attaint, and *Audita querela*, and as theſe have but little Similiarity
with each other, ſo that the Law which regards the one, rarely affects
the other, Lawyers have ſeldom Occaſion to uſe the Word, which ſigni-
fies the Genus, but ſpeak generally of one or other of the Species; and
the Word *Appeal* is appropriated to ſignify a particular Accuſation. But
as it is very probable that this Inſtruction was not drawn by a Lawyer,
and we know it was given for the Direction of Gentlemen not much

verſed

verſed in Law Terms; it is very probable that it is here uſed, in the common Acceptation of the Word, to ſignify any Removal of a Cauſe, from one Court to another; and this with more Propriety, as it may intend to include two of the Species above mentioned, a Writ of Error, and a Writ of falſe Judgment; the latter of which is a Remedy againſt an erroneous Judgment, in a Court not of Record.

" This being the plain Meaning, and certainly the moſt legal Explanation of this Inſtruction, a Writ of Error ſhould have been ſent, and then your Honours would have had the Record before you: By the Inſtruction you are to ſend the uſual Writ, and we as Judges dare not obey any other than ſuch as are warranted by Law. All Others we muſt look upon as Letters contrived to delay or obſtruct the Courſe of Juſtice.

" But it may be aſked, what Remedy ſhall the Party have, who is aggrieved by an unjuſt Verdict, or an Error in Fact.——To which the Anſwer is, he may have a Writ of Error, to try the Fact in the ſame Court; or he may have his Writ of Attaint, or according to the uſual Practice, move the Court for a new Trial; or he may have his *Audita querela*: All which are competent Remedies according to the Nature of the Caſe, without carrying the Matter before another Judicatory: Becauſe, the Judges are not concerned in any Errors in Fact, but ſuch as may be made Part of the Record by a Bill of Exceptions, if the Party pleaſes, and conſequently they ſtill remain indifferent, and therefore an Appeal from their Judgment is unneceſſary.

" But what makes it evident, that the King did not intend by the above Inſtruction to alter the Law, and the Methods of Proceeding in the Supreme Court is this, The Inſtruction is not directed to the Judges of that Court, and therefore was not intended to regulate their Conduct: They muſt ſtill determine and act according to Law, and nothing can be more abſurd than to ſuppoſe, that they muſt have Recourſe to a Governor's Inſtructions, to ſpell out their Duty from ſuch Scraps of them as he ſhall think proper to communicate. Further, it is evident, that Writs of Error were only meant by this Inſtruction.

I. Becauſe it directs the Governor to iſſue a Writ in the Manner which has been uſually accuſtomed, and this is the uſual Writ, and no other has been uſed.

II. This

II. This will bring up all that the Juſtices of the Supreme Court ca
ſend, and therefore any other Writ muſt be uſeleſs. Nothing elſe is i
our Power at preſent, but the Record, and *that* we are ready to ſen
as ſoon as it is properly demanded. In civil Law Courts, the Evidenc
is reduced to Writing, and therefore, upon an Appeal, may be tranſ
mitted. But ſend to us as many Letters as you pleaſe, and let then
contain Terms ſtill more menacing than thoſe ſent us upon this Occaſion
if the Law did not fully juſtify us in our Refuſal to return them, ou
Excuſe would be *Nil dat, quod non habet.* The Evidence went to th
Jury, moſt of it was delivered *viva voce*, and it is impoſſible for us te
retain it in our Memories: Should we make Records of all that wa
ſaid by each Witneſs, in every Trial, the Labour would be endleſs, and
the whole Year would not ſuffice for the Trial of the Cauſes which
yearly ariſe ; tho' the Court ſhould ſit every Day, and the Country be
obliged to a perpetual Attendance.

" But as the Chief Juſtice has ſufficiently ſhewn the Inconveniencies
which muſt attend this new Practice, I ſhall not enlarge on them,
tho' many others might be mentioned that would reſult from altering the
Law, in ſo eſſential a Point as Trials by Juries.

" I have as much as poſſible in giving your Honours theſe Reaſons
for my Conduct, avoided ſaying any Thing the Chief Juſtice has already
obſerved ; becauſe I would not treſpaſs on your Patience, by an unneceſ-
ſary Repetition. But he has been ſo copious, and has treated the Matter
ſo well, that I have not been able to avoid ſliding into ſome of them.

" Upon the Whole, it appears to me a very unſafe Interpretation of
this Inſtruction, to ſay, that his Majeſty deſigned by it to eſtabliſh ſuch
a Court, as has been altogether unknown to *Engliſhmen*, ſince the glo-
rious Revolution. That he intended (except in Cauſes thought too
trifling to admit of an Appeal) to deprive his Subjects in this Colony of
their indiſputable Right to Trials by Juries, one of the moſt antient
Privileges of *Engliſhmen*, confirmed to them by the great Charter, eſ-
ſential to, and the grand *Palladium* of their Liberties.

" Such a Suppoſition would be extremely injurious to his Majeſty,
and the Memory of his Royal Grandfather, in whoſe Time this Inſtruc-
tion was firſt given, eſpecially as the Monarchs of the illuſtrious Houſe
of Hanover, could never be juſtly charged with taking a ſingle Step
towards infringing the Liberties of their People.

December 12, 1764. ROBERT R. LIVINGSTON."

At

At a Council held at *Fort George*, in the City of *New-York*, on *Wedneſday* the 26th Day of *December*, 1764.

PRESENT,

The Hon. CADWALLADER COLDEN, Eſquire,
Lieutenant Governor, &c.

Mr. WATTS,	Mr. READE,
Mr. WALTON,	Mr. MORRIS.
Mr. DE LANCEY,	

Waddel Cunningham, againſt *Thomas Forſey*, } ON APPEAL.

A Letter from Mr. Juſtice *Jones*, dated the 21ſt Inſtant, in Anſwer to the Queſtion on which he was deſired, by Order of this Court of the 12th Inſtant, to give his Opinion, was read, and is as follows, *viz.*

"I Have received from Mr. *Banyar*, the Copy of the Minute of Council, made at the Council held at *Fort-George*, in the City of *New York*, on Wedneſday the 12th Inſtant; by which I am deſired to give my Reaſons, why the Appeal moved for in the Cauſe of *Waddel Cunningham*, againſt *Thomas Forſey*, in the Court below, was not allowed; or whether according to the Laws and Conſtitution of *England*, an Appeal from the Verdict of the Jury, on the whole Merits of this Cauſe, could lie? In anſwer to the firſt Part, I have only to acquaint your Honour, and the Gentlemen of the Council, that I happened not to be in Court, the laſt Day of the Term, when the Appeal was moved for: As to the Second, *viz.* Whether according to the Laws and Conſtitution of *England*, an Appeal from the Verdict of the Jury, on the whole Merits of this Cauſe, could lie?—In Anſwer to this Queſtion, I muſt declare to your Honour, and the Gentlemen of the Council, that

in all my reading, on the Laws and Conſtitution of *England*, I cannot recollect that I have ever met with any Thing in Favour of ſuch an Appeal. On the Contrary, the known Rule is, *ad Quæſtionem Juris reſpondent Judices, ad Quæſtionem Facti reſpondent Juratores.* The Book intitled *The Law of Errors*, P. 4, ſays, it is a known Rule in our Books, "a Judgment being once given in *Curia Domini Regis*, ought "not to be reverſed, nor avoided but by Error, or Attaint, for all "Matters of Fact at common Law, are decided by a Jury of Twelve "Men, againſt whom if they err in their Judgment, the Party grieved "may bring Attaint." The Writ of Attaint lay originally at common Law, and is affirmed with ſome Alterations by the Statute of the 23d of HENRY the Eighth, C. the 3d; and in *Wood*'s Inſtitute of the Laws of *England*, P. 637, is thus deſcribed; "A Writ of Attaint "lies againſt a Jury, and is to examine whether a Jury of twelve Men "gave a falſe Verdict, or contrary to Evidence, in a Court of Record "upon Iſſue joined: That upon Conviction of the Jury, the Judgment "following upon it may be reverſed." This appears to me to be the only Method formerly uſed to ſet aſide or avoid the Verdict of a Jury; but as *Wood* ſays, in the ſame Place, is now almoſt out of Uſe; and inſtead thereof, Motions are uſually made for new Trials when a Verdict is given contrary to Evidence; which ſeems to be the preſent Practice in the Courts at *Weſtminſter*, and is the Practice of the Supreme Court here: In removing a Cauſe from one Court to another for Matter of Error, the common Method I take to be by Writ of Error, tho' ſometimes by *Certiorari*, and the Proceedings on ſuch Writs, are in Relation to the Errors of the Judges, in Matters of Law; and are not to have Reſpect to the Verdict of the Jury, as appears to me from the Statute of the 27th of ELIZABETH, C. 8th, how erroneous Judgments in the King's Bench, upon certain perſonal Actions may be redreſſed; where Verdicts are expreſsly excepted.— I therefore give it as my Opinion, that according to the Laws and Conſtitution of *England*, the Appeal mentioned in the Queſtion could not lie.

DAVID JONES."

At

At a Council held at *Fort George*, in the City of *New-York*, on Wednesday the 9th Day of *January*, 1765.

PRESENT,

The Hon. CADWALLADER COLDEN, Esquire,
Lieutenant Governor, &c.

Mr. WATTS, Mr. READE,
Mr. WALTON, Mr. MORRIS.
Mr. DE LANCEY,

Waddel Cunningham.
against
Thomas Forsey,
} ON APPEAL.

THE Reasons of the Gentlemen of the Council, why the Appeal in this Cause cannot be received; as also farther Reasons of Mr. Justice *Livingston*, in Support of his Opinion already delivered in this Cause, were read.

At a Council held at *Fort George* in the City of *New-York*, on Friday the 11th Day of *January*, 1765.

PRESENT,

The Hon. CADWALLADER COLDEN, Esquire,
Lieutenant Governor, &c.

Mr. WATTS, Earl of STIRLING,
Mr. WALTON, Mr. READE,
Mr. DE LANCEY, Mr. MORRIS.

Waddel Cunningham,
against
Thomas Forsey,
} ON APPEAL.

HIS Honour the Lieutenant Governor required the Opinion of the Council on the following Question.

"Whether by the 32d Instruction, the King has directed his Gover-
"nor to permit and allow Appeals in all civil Causes, from the Courts of

" of common Law within this Province; and whether his Majeſty has " by the ſame Inſtruction, directed his Governor and Council to hear " and determine ſuch Appeals?"

Whereupon the Council declared, that as the King's Judges, and the moſt able Council in the Law in the Province, have given their Opinion, that no other than an Appeal on *Error*, can lie by this Inſtruction; they are unanimouſly of Opinion, no other Appeal than on *Error*, is the Intention or Meaning of the Crown by this Inſtruction, and that they cannot take Cognizance of any other Appeal.

His Honour the Lieutenant Governor declared his Diſſent from the ſaid Opinion, and ſignified he would give his Reaſons for ſuch his Diſſent to his Majeſty's Miniſters.

Whereupon a Motion was made, that the Reaſons offered by the Council in this Cauſe, on Wedneſday laſt, ſhould be entered, which were ordered to be entered accordingly, and are in the Words following:

Waddel Cunningham,
Claiming to be Appellant
againſt
Thomas Forſey.

HIS Majeſty's Council for the Province of *New-York*, as conſtituting with the Governor or Commander in Chief for the Time being, the Court eſtabliſhed by his Majeſty's royal Predeceſſors, and referred to in his preſent Majeſty's 32d Inſtruction; conceiving it to be a Queſtion of the utmoſt Importance, whether by Virtue of that, or any precedent royal Inſtruction, they are authorized in Conjunction with his Honour the Lieutenant Governor, to hold Cognizance of this Cauſe, on an Appeal upon the Merits, from the Verdict of a Jury?

On this momentous Topic, the Lieutenant Governor, and the Council, have taken the utmoſt Pains to form a Judgment, by which Juſtice may be diſtributed to the Subject, conſiſtent with the known and eſtabliſhed Laws of the Land, and the true Senſe and Meaning of the royal Inſtructions.

In this Veiw, as it is a Caſe of the firſt Impreſſion, the Court unanimouſly called upon the Judges of the Supreme Court, and ſeveral Counſel of the beſt Reputation in their Profeſſion, who have all concurred in Opinion, that we are not authorized either by Law or by any of the royal

royal Inſtructions, in ſeveral Inſtances ſo evidently grounded on the Laws of *England*, to hold juriſdiction of this Cauſe, as it is now brought before us. The Court has beſides thoſe Aids, given every Advantage to a Point of ſo great Moment, which the moſt mature Conſideration could afford: And that it may appear upon what Reaſons his Majeſty's Council have the Unhappineſs to differ in Opinion from his Honour the Lieutenant Governor, they beg Leave to conſider the Reaſons urged by him in Favour of the Appeal, as it is now brought before us; and to ſubjoin ſuch Anſwers to thoſe Reaſons, as it is conceived the Law will warrant.

His Majeſty's Council humbly hope, that they cannot better Recommend themſelves to his royal Approbation, than by making the Law of the Land the Rule of their Conduct, in the Execution of every Part of the important Truſt committed to them; and flatter themſelves, that their Diſſention in Sentiment from his Honour, as it is founded on the cleareſt Law, will be a full Demonſtration of their Fidelity to the beſt of Princes.

In this material Diviſion in the Sentiments of this Court; his Majeſty's Council are of Opinion, that his Honour's Reaſons will, if literally incorporated into this their Anſwer, appear in a View, the moſt advantageous of which they are capable: And as we with the utmoſt Willingneſs ſubmit the Reaſons of our Judgment to the Conſideration of thoſe, who by Law are inveſted with a Power to correct our Errors, and controul our Determinations, we flatter ourſelves that his Honour would not decline the ſame Tribunal; and as we preſume the Law muſt at laſt determine upon this Difference, ſo alſo we conceive that ſuch Determination can beſt be made upon a fair State of the Contraſt.

In the Purſuit of this Method, his Honour's Reaſons will be reduced into as many different Paragraphs, as their Subject Matter naturally dictates; to each of which his Majeſty's Council will offer ſuch Anſwers, as their Duty to their Prince, and the Laws of the Land clearly and undeniably ſuggeſt. The firſt Paragraph is as follows:

" An Error I conceive runs thro' all the Arguments I have heard on
" this Subject, in not diſtinguiſhing between the Laws and the Execution
" of them: The executory judicial Powers are certainly in the Crown:
" The King is the Fountain of Juſtice: The Power of erecting Courts
" of Juſtice is conſequently in the Crown. The King may give them

" ſuch

" ſuch Modes of Proceeding, ſuch Extent of Authority and Juriſdiction,
" as he thinks moſt proper for obtaining Juſtice, in the Countries where
" ſuch Courts are erected, ſuited to the Circumſtance of the Country ;
" and it may be done without the leaſt Alteration of the Law, by
" which ſuch Courts muſt Judge. This is evident in our Colonies ;
" every Colony has different Courts and Modes of Proceeding
" from thoſe in other Colonies ; and all of them different from the
" Courts in *England* ; yet the ſame common Law has its full Force in
" all of them."

In Anſwer to this we obſerve :

That we think the Diſtinction which his Honour ſuppoſes between the Laws and the Execution of them, in the Senſe urged in his Reaſons, is groundleſs. For tho' we agree with him, that the Law muſt eſſentially and unalterably be the ſame, unleſs changed by legiſlative Act, (which the Diſtinction taken by him neceſſarily ſuppoſes) and that judicial Powers are in Suppoſition of Law in the Crown, that the King is the Fountain of Juſtice, and the Power of erecting Courts is in the Crown : Yet we beg Leave to deny his Inference, that the King may give them ſuch Modes of Proceeding, ſuch Extent of Authority and Juriſdiction as he thinks proper, as well as that ſuch Modes may be introduced as have hitherto been unknown, without the leaſt Alteration of the Law, by which ſuch Court muſt Judge.

For, 1ſt, we conceive that tho' the Crown has Authority to erect and conſtitute Courts, yet every Court muſt have ſuch a Juriſdiction, and muſt be ſo modelled in its eſſential Parts, as to have a known and common Law Juriſdiction.

6 Rep. 11.---Wood's Inſt. 447. Vin. tit. Prerogative, P. 561, No. 8.

2dly. Wherever ſuch new modelled Courts are eſſentially different from thoſe known in the Law, the Law muſt neceſſarily and of Courſe be altered ; as the Maxim wiſely ſpeaks, *Mutata Forma prope interemitur Subſtantia rei* ; for Inſtance, were the Lieutenant Governor's Suppoſition juſt, that his Majeſty's 32d Inſtruction did intend that this Court as a Court of Appeals, ſhould have Cognizance of Matters of Fact, already ſettled and determined by a Jury, it would alter the Law in the grand and eſſential Point of Trials by Juries, whoſe Verdicts by the Laws of *England*, are the only Means by which Facts can be determined, and would amount to a Reverſal of the common Law

Law Er. 4.----Cro. Ja. 335, 336--Trials per pais, 6th Ed. 227, 228. Vaughan 148, 149.

Maxim,

Maxim, *ad Quæſtionem Juris reſpondet Judices, ad Quæſtionem Facti reſpondent Juratores.*

3dly. Tho' different Methods of Proceeding in the different Colonies, are rather aſſumed by them than warranted by Law, and yet the principal Difference between them is perhaps in Matters of Form, (in which all the various Courts of Law in *England* do alſo differ); but the eſſential Parts of every common Law Court, *to wit*, a Jury to determine the Facts, and Judges to ſpeak the Law, are to be found, in all the Courts of Law of every Colony.

" His Honour in the next Paragraph obſerves, that " In all the " Colonies Appeals to the King lie —— this is eſſential to the Preroga- " tive of the Crown, without which the Dependence of the Colonies " cannot be preſerved. The preſerving the Dependence of all the " Dominions of the Crown, the Parliament of *Great-Britain* evidently " had in View, in the Act of the 6th of GEORGE the 1ſt. *for the bet-* " *ter ſecuring the Dependency of Ireland*; but as this Matter is of great " Importance, I ſhall conſider it more diſtinctly."

His Majeſty's Council obſerve on this Paragraph, that the Word Appeal is uſed without ſettling its Definition: If by it is intended an Appeal upon Matters of Fact, they cannot help obſerving it is a *Petitio Principii*. That in all the Colonies an Appeal in the confined Senſe of the Word (and in the only proper Senſe in which it is known in the Law of *England*, *to wit*, from the Judgment of the Judges in Matters of Law, will lie to the King as preſent in Suppoſion of Law) in all his Courts, cannot be doubted. And in this Senſe an Appeal is clearly both eſſential to the Prerogative of the Crown, and abſolutely neceſſary for maintaining the Dependence of the Colonies, as the Inferior upon *Great-Britain*, as the Superior Dominion; and theſe indeed are the only Reaſons why an Appeal in any Senſe of the Word will lie. For thus the greateſt Lawyers reaſon on the Subject.

As ſuch Dominions are not Parcel of, but Dominions dependent on *Great-Britain*, no remedial Writs between Subject and Subject will lie, from the ſuperior to the inferior Dominion; as they do from the Courts of *Weſtminſter* to any of the Counties of *England*, except Writs of Error. But if the Errors of Judges in the dependent Dominion might not be corrected by ſome Judicatory in the Kingdom on which it depends, theſe Conſequences would follow, *to wit*.

1ſt. That

1ſt. That the Law appointed or permitted to ſuch inferior Dominion, might be inſenſibly changed within itſelf, without the Aſſent of the Dominion ſuperior.

2dly. That Judgments might be then given to the Diſadvantage or leſſening of the Superiority; which cannot be reaſonable: and to make the Superiority to be only of the King, but not of the Crown of *Great Britain*, as King *James* once would have it in a Caſe concerning *Ireland*.

Therefore it neceſſarily follows, that Writs of Error into all Dominions belonging to *Great Britain*, upon the ultimate Judgments there given into the King's Courts of *England*, to reverſe or affirm Judgments, are neceſſary to ſupport a Dependence, and are the only Writs that lie concerning Property between Subject and Subject. *Vaughan's Repo.* 401. 402.

But that Appeals upon Matters of Fact, are not neceſſary to ſupport the Dependence in Queſtion, is obvious at firſt View, for whether a Queſtion of Fact be determined between Subject and Subject, either in the Affirmative or Negative, cannot poſſibly affect ſuch Dependence.

As to the Statute for ſecuring the Dependence of *Ireland*, we cannot conceive how his Honour ſhould think of applying it to the preſent Caſe; for,

1ſt. It contains not a ſingle Word in Relation to the Colonies, and therefore we cannot ſee the Propriety of the Aſſertion, that in the paſſing of that Act, the Parliament of *Great Britain*, had in View the preſerving the Dependence of *all* the Dominions of the Crown.

2dly. That Act as far as it provides for ſecuring the Dependence of *Ireland*, directs nothing more than that the Houſe of Lords in *Ireland* ſhall not have any Juriſdiction to judge, affirm or reverſe, any Judgment, Sentence, or Decree, made or given there, or in other Words, that they were not a Court of Appeals, either in Law or Equity. The Statute therefore cannot be underſtood to have intended a Change or Alteration in the Law, by giving the Subject in *Ireland* a Right of appealing from the Verdict of a Jury. In the next Paragraph his Honour obſerves, that,

" By the Word Appeal in Law is meant the removing the Cauſe from " an inferior to a ſuperior Judicatory: By Writ of Error the Cauſe is

" not

" not removed, but ſome diſputed Points in Law are determined, and " which may have no Relation to the Merits of the Cauſe.—— Appeals " to the King in Perſon were by the common Law, both before and " after the Conqueſt, and are confirmed by *Magna Charta*, *nulli* " *vendemus*, *nulli negabimus*, *nec deferemus Juſtitiam*, relates eſpecially " to Appeals, in which the King was Judge ; for to ſell, deny, or de- " lay Juſtice, can have no reference to any Perſon, other than a Judge : " The Complaint was, that large Sums of Money were demanded for " Writs of Appeal, and at other Times they were denied or delayed. " To remedy theſe Complaints, this Clauſe was made Part of the great " Charter ; thereby the Subject's Right to Appeals is confirmed, not " taken away."

We agree with the Lieutenant Governor, that by an Appeal in Law, is meant the Removal of a Cauſe from an inferior to a ſuperior Judicatory.

But in Oppoſition to his Opinion, we beg Leave to ſhew in a few Words, that by Writ of Error the Cauſe and its Merits are removed, for the Record itſelf which contains the whole Pleadings between the Parties, the Iſſue, the Verdict, and the Judgment is removed ; and the Errors eſſential in the Law in either Part of the Record are corrected, and the Judgment in the Whole is either reverſed or affirmed.—— Thus then the Merits in Law ariſing from the Matters of Fact, contained in the Record, muſt neceſſarily receive their Determination in a Court of Errors; nor can it juſtly be ſuppoſed, that conſtitutional Courts have been erected with Power to lay their Hands on the Proceedings in a Cauſe only to furniſh an Opportunity for handling ſome diſputed Points in Law, which have no Relation to the Merits of the Cauſe : Every Error therefore, which is corrigible by Law, muſt, in Suppoſition of Law, be eſſential to the Merits of the Cauſe ; otherwiſe Writs of Error, inſtead of being conſtitutional Remedies, would neceſſarily and eſſentially contravene thoſe Words of the great Charter *nulli negabimus*, *nulli differemus Juſtitiam vel Rectum*. Thus then we conceive, that the Diſtinction ſet up by his Honour between Appeals and Writs of Error, is groundleſs ; and that a Writ of Error is an Appeal upon the Merits in Law ; in which Senſe the Word Appeal is clearly underſtood in the Books, as may be ſhewn from a great Number of Authorities.

Salk. 511. *Comb.* 276.--2 *Lord Ray*, 1447.---- *Hales Hiſtory com. Law*, 48.--- *Id.* 150, 51. *Sparſim*,

But as his Honour has been pleaſed in this Paragraph to furniſh a Comment on the Chapter of *Magna Charta*, a Paſſage from which we

have

have mentioned, we muſt take the Liberty to oppoſe it with another Comment on the ſame Words, given by the great Lord *Coke*, which clearly ſhews, 1ſt. That this Chapter cannot concern the King's Perſonal Adminiſtration of Juſtice on Appeals upon Matter of Fact, but the Adminiſtration of Juſtice by his known and ordinary Courts; in all which, the King, tho' not in Fact, yet in Suppoſition of Law is preſent, which is the Reaſon that the King himſelf, in the Words of the Charter, declares, he will not do what he intends his Court ſhall not; 2 *Inſt.* 46.
" And thus ſpeaks the great Oracle of the Law; no Man
" ſhall be condemned at the King's Suit, either before the King in his
" Bench, where the Pleas are *Coram Rege*, (and ſo are the Words, *nec*
" *ſuper eum ibimus* to be underſtood) nor before any other Commiſſioner
" or Judge whatſoever; and ſo are the Words, *nec ſuper eum mittemus* to be underſtood, but by the Judgment of his Peers, that is his Equals, and according to the Law of the Land;" and from this Paraphraſe the Author ſays, the Senſe of the other Clauſe; *we will deny, ſell, or refuſe Juſtice to no Man*, is diſtinctly underſtood: And upon the ſame Clauſe he further obſerves thus; " This is ſpoken in the Perſon of *Ib.* 55.
" the King, who in Judgment of Law in all his Courts is
" preſent, and repeating theſe Words, *Nulli vendemus*, &c. Or,

2dly. Theſe Words as they have been expounded by other Acts of Parliament intend that, " by no Means common Right or *Ib.* 56.
" common Law ſhould be diſturbed or delayed, not though
" it be commanded under the great Seal (as in the preſent Caſe) or by
" privy Seal, Order, Writ, Letters, Meſſage, or Commandment what-
" ſoever, either from the King or any other; and that the Juſtices ſhall
" proceed (as in this Caſe they have done) as if no ſuch Writs, Letters,
" Order, Meſſage, or other Commandment were come to them."

And thus it appears clearly from the beſt Comment on the Subject, that his Honour in applying this Chapter of *Magna Charta*, to the ſuppoſed Appeal, in which the King was the Judge, has miſunderſtood the Text: We are therefore at a Loſs to diſcover from whence his Honour has collected the Reaſon upon which he alledges this Chapter of the great Charter was grounded, (to wit) *That large Sums of Money were demanded for Writs of Appeal; and at other Times, they were denied or delayed, or that this Clauſe was made Part of the great Charter, to confirm the Subject's Right to Appeals.*

Before

Before we proceed to a particular Conſideration of the reſt of his Honour's Reaſons, it will be neceſſary to extract and refute a latent Diſtinction which implicitly runs thro' moſt of them: It is this, That tho' the Colonies are intitled to the Antient common Law of *England*, as it ſtood before the Time of the great Charter, yet none of the Laws which took Place ſince that important Æra, do extend to the Colonies.

This Diſtinction we conceive may be refuted by obſerving:

1ſt. That it has been ſolemnly adjudged before the King in Council, that in all Colonies the Subjects carry with them the Laws of *England*, and therefore as well thoſe that took Place after, as thoſe which were in Force before the paſſing of the great Charter.——2 Peer W. *Solk.* 411. 2 *Mod.* 47.

2dly. That by the Statute of 7 & 8, W. III. the Laws of *England*, as they then were, and as they ſhould appear to be thereafter, are made the Standards of Law in the Colonies; as,

3dly. They are alſo by one of his preſent Majeſty's Inſtructions, in which the Governor or Commander in Chief is directed "to take "Care that no Man's Life, Members, Freehold, or Goods, be taken "away or harmed, otherwiſe than by eſtabliſhed and known Laws, "not repugnant to, but as much as may be, agreeable to the Laws of "England," purſuant to which Adjudication, Statute, and Inſtruction,

4thly. The Laws of *England* in themſelves, and in the Manner of adminiſtering them, have been the Meaſure of Right and Wrong between Subject and Subject in this Colony, from its firſt Settlement, down to the preſent Day; and will doubtleſs be maintained as ſuch, agreeable to the Coronation Oath eſtabliſhed by the Statute of the 1 W. and M. Statute 1, Chap. 6, Sec. 2. according to which, the King ſwears to govern the People of *England*, *and the Dominions thereunto belonging* according to the Statutes in Parliament agreed on, and the Laws and Cuſtoms of the ſame.

Notwithſtanding which, the Lieutenant Governor evidently proceeds upon the abovementioned Diſtinction, in his next Paragraph, which is in theſe Words:

"At the Time of the great Charter, all the Property of the Nation "was determined in the Hundred Court, County, or Sheriff's Court,

"and

" and Baron's Court; and if the Party could not obtain Juſtice in " thoſe Courts, he might appeal to the King, who would do him Juſ- " tice---To do Juſtice was alſo Part of the antient Coronation Oath."

Upon which we obſerve:

1ſt. That if by the Law of *England* no ſuch Appeal as he maintains did lie in *England*, at the Time of the Settlement of this Colony, it could not for the Reaſons we have aſſigned ever lie here. ——

2dly. We muſt take the Liberty to obſerve, that the Lieutenant Governor when he aſſerted, that at the Time of the great Charter, all the Property of the Nation was determined in the Hundred Courts, &c. muſt have forgot the great Courts at *Weſtminſter*, and the Juſtices in Eyre, for to ſuppoſe that the Courts at *Weſtminſter* and in Eyre, were then in Being, and without Employment, is really difficult; that however, the King's Bench and common Pleas exiſted before the great Charter, appears from 11 Chapter of the Charter itſelf, which runs thus, *Communia Placita non ſequuntur Curiam noſtram ſed tenentur in aliquo certo Loco*: The ſame Point is manifeſted by the next Chapter, which runs thus, *Juſtitiarii de Banco*, that is, the Juſtices of the Court of common Pleas are expreſsly named: as alſo by my Lord *Coke*'s Comments upon thoſe Chapters. And with Reſpect to all the four great Courts at *Weſtminſter*, it was adjudged ſo early as in the Reign of *Edward* IV. that they were all by the common Law. In the Time of *R.* I. Pleas of Land were indifferently held in the King's Bench and common Pleas; and tho' in the Reign of his Father, King *H.* II. the Adminiſtration of common Juſtice had by the Practice of the Subject, who was apt to ſeek Juſtice nearer Home than in the Courts of *Weſtminſter*, been almoſt wholly drawn to the County Courts, Hundred Courts, and Courts Baron; yet Juſtices in Eyre were in that Prince's Reign appointed by Act of Parliament, who were *Miſſi per ſingulos Angliæ comitatus, & Juraverunt quod cuilibet jus ſuum Conſervarent illæſum.*

2 Inſt. page 21. &c.

10 Ed. 4 fo. 53
8 Rep. pref. 16
Hales hiſtory of com. law, 146.

And that the Kings of *England* never did ſince the Æra, that is often Times, tho' unjuſtly called the *Norman* Conqueſt, adminiſter Juſtice in Perſon, is evident from a Paſſage in the antient Book, called the Mirror of Juſtice, which contains the Law as it ſtood " above 1200 Years ago, and has in it a Paſſage in old *French*, " which tranſlated runs thus: the Kings uſed to do right in Perſon to " all

4 Inſt. 73.

" all the Subjects, or by their Chief Juſtices, but now they Decree Juſ-
" tice by their Juſtices Errant Commiſſioned for all *Mir. Chap. 2, § 3.*
" Pleas ;" and my Lord *Coke*, in extracting the Sub-
ſtance of this antient Author in his Preface to his 3d Rep. ſays, in this
" Book in Effect appeareth the whole Frame of the antient common
" Law of this Realm ;" and then proceeds to Inſtance the Truth of this Obſervation, by exhibiting from the *Mirror* a Sketch of the Authority of all the common Law Courts ; among which are the Four great Courts at *Weſtminſter*, and particularly the Court of King's Bench, of which he ſpeaks thus ; " The King's Bench, Chief Juſtices holding
" Pleas of the King, and ſoon after the Office of Chief Juſtice be-
" longed to redreſs, and puniſh by Writ, the wrongful Judgments,
" Wrongs and Errors of other Juſtices, and to Cauſe to come before
" the King, the Parties and the Record, &c. that is before the King,
" becauſe he always ſat in Perſon in his Bench ; tho' the Judges rendered
" the Judgments :" And from this Paſſage it appears to a Demonſtration, that the King's Bench before the Conqueſt, enjoyed the Power of correcting by Writ, that is by Writ of Error, the wrongful Judgments and Errors of all other Courts ; which in truth appears to be the only Appeal, (except in criminal Matters, where the Word is uſed in a different Senſe) that was ever known in the Law.

In the Reign of King *John*, the Buſineſs of the inferior Courts gradually diminiſhed, and the Buſineſs of Moment *Hales Hiſt. Com. Law, 150.*
came to the great Courts ; theſe gave a ready Ear to Writs of falſe Judgment, *which was the Appeal the Law allowed from erroneous Judgments in the County, and other inferior Courts* ; and by theſe Writs, a Variety of which may be found in the Regiſter, nothing but the Record of the Cauſe which was made for the Purpoſe, was ſent up : And theſe muſt be the Appeals alluded to by his Honour ; which however appear to be in the Nature of Writs of Error ; and were uſed to bring up the Judgments of the inferior Courts into the Courts at *Weſtminſter* ; where the Errors in Law, in the Judgments of thoſe lower Judicatories were corrected by the King's Judges, and not by the King himſelf. ——

But it may not be amiſs to take Notice here, of what the Lieutenant Governor ſays on the Subject of the Court of Huſtings, or the Mayor's Court of *London*. —" In the Mayor and Sheriff's Court, commonly
" called

" called the Huſtings, where all the Property of the Citizens is deter-
" mined, a Writ of Error does not lie, but an Appeal : In Conſe-
" quence of which, the King appoints Commiſſioners, who are *to do*
" *full and ſpeedy Juſtice*. They do not only reverſe, or affirm the
" Judgment of the Huſtings, but they give ſuch Judgment as the
" Huſtings ought to have given. The Juriſdiction of the Huſtings is
" by common Law ; and Writs of Error do not lie in any Court whoſe
" Juriſdiction is by common Law, but an Appeal does."

Upon which we obſerve, that the Lieutenant Governor is again miſtaken in ſuppoſing that an Appeal lies from the Huſtings to Commiſſioners in Matters of Fact ; and that thoſe Commiſſioners do full and ſpeedy Juſtice upon the whole Merits, both in Fact and Law. On the Contrary, it will appear from the Peruſal of the Books on the Subject, that they act merely as a Court of Errors, in either reverſing, or affirming the Judgment of the Huſtings. *Fitzherbert* aſſerts, " that if an erroneous Judgment be given *New. Nat. Brev. 53, H.*
" in the Courts before the Sheriff of *London only*, the Party grieved
" ſhall have a Writ of Error out of Chancery, directed unto the Sheriffs,
" to bring the Record before the Mayor and Aldermen, in the Huſ-
" tings of *London* ; and there the Record ſhall be examined ; and if
" there be Error, they ſhall reverſe the Record there, by the Cuſtom
" of the ſaid City : And if erroneous Judgment be given *Item. 55 E.*
" in the Huſtings in *London*, before the *Mayor and the* *4 Inſt. 247. 248.*
" *Sheriffs* there, then the Party who will ſue to reverſe the Jndgment,
" ſhall come into the Chancery, and there ſue a Commiſſion," directed
" to Perſons to examine the Record and Proceſs, and the Errors, and
" thereupon to do Right. And a Man ſhall have a Com- *New. Nat.*
" miſſion to examine the Errors in a Judgment given in the *Brev. 55. G.*
" Huſtings in the Time of another King, and in the Time of another
" Mayor, and other Sheriffs :" And in the ſame Chapter, the Author ſpeaks repeatedly of ſuing Writs of Error, and Commiſſions to remove the Judgments of the Mayor and Sheriffs of *London*, and of correcting the Errors of their Judgments. And from the ſeveral Forms of Writs and Commiſſions of Error to the Huſtings, contained in that Chapter, it appears clearly that they are eſſentially and ſubſtantially the ſame as Writs of Error in other Caſes, and to other Courts. And we ſuppoſe that the Lieutenant Governor's Miſtake on this Subject, proceeded from the Uſe of the Word Commiſſion, inſtead of Writ, tho' in Fact and Truth, every Writ of Error is more properly a Com- *Law of Errors 2 and 3.*
miſſion than a Writ.

His

His Honour in the Sixth Paragraph obſerves, that,

" From the Nature of the Courts, which exiſted by common Law, " it is evident, that the Diſtinction now in Uſe, between Writs of " Error and Appeals, could not then exiſt ; becauſe there was no ſuch " Diſtinction then, between the Jury and the Judges, as now in the " Courts of *Weſtminſter*. By common Law the Jury was abſolutely " Judge of both Law and Fact. This is ſtill evident in the Sheriff's " Court, Coroner's Court, and in the Houſe of Peers : Appeals muſt " extend to the whole Merits, where there was no Diſtinction between " the Verdict of the Jury, and the Judgment of the Court, as it is " evident by common Law there is not."

Upon which his Majeſty's Council Remark, that,

Proofs are not wanting in the Books to ſhew that Juries were in Uſe, even among the antient *Britons* ; that as Juries now do, ſo did they of all Times try the Matters of Fact ; that as they now are in ſome Senſe Judges of Law, where they take upon themſelves to find general Verdicts, ſo were they antiently ; and by the antient common Law they were no more Judges of Fact ſolely, than they now are : The Evidence formerly was never reduced to Writing any more than it now is, *to wit*, on Demurrers and ſpecial Verdicts ; in which the Law was always reſerved for the Determination of the Court ; and the Maxim, *ad Quæſtionem Juris reſpondent Judices, ad Quæſtionem Facti reſpondent Juratores*, is an antient common Law Maxim : To ſuppoſe therefore that there is now a Diſtinction between Appeals and Writs of Error, which did not antiently exiſt, appears to us altogether groundleſs ; the Truth is, no ſuch Diſtinction now does, or ever did exiſt. Nor do we conceive, that the Inſtances adduced from the Sheriff's Court, Coroner's Court, and Houſe of Peers, are at all pertinent : In the two firſt, Facts are ſettled in the ſame Manner as they are in the Courts of *Weſtminſter, to wit*, by a Jury ; and in the Houſe of Peers, nothing but Matters of Law, except where the Appeal is from the Equity Side of the Chancery, or Exchequer, in which the Proceedings by the Law of the Land are to be in the *Pretorian* Method, and the Evidence reduced to Writing, are ever determined there ; it being below their Dignity to try Matters of Fact. *Salk.* 511.

His Majeſty's Council conceive, that his Honour is miſtaken in his Opinion, that Writs of Error were introduced into the Courts of *Weſtminſter, long after the great Charter*. The Paragraph in which this is contained runs thus : " Writs

" Writs of Error I have Reaſon to believe were introduced into the " Courts of *Weſtminſter*, long after the Time of the Great Charter— " Courts are known to aſſume Powers, which did not originally belong " to them. —— Judge *Coke* ſays, *boni Judicis eſt ampliare Juriſdictionem.* " If theſe aſſumed Powers are found beneficial, they become confirmed " by Uſage ; ſuch are Writs of Error : But as they are not by common " Law, they are confined to the Courts, where ſuch Uſage prevails. " For this Reaſon, and their being uſeful they were extended by Acts of " Parliament to other Courts and Places, where ſuch Uſage did not " prevail.—The Neceſſity of an Act of Parliament, ſufficiently ſhews, " that they are not by common Law : This is made more evident by " what I think is univerſally agreed, with Reſpect to the Iſlands of " *Jerſey* and *Guernſey*, where Judicial Trials are by Jury ; that in Caſe " any Party is aggrieved by any Sentence, or Judgment, there he is " to have his Remedy by Appeal, to the King in his Privy Council ; " and that Judgments are not to be examined by Writs of Error. " The Reaſon given is, *that tho' theſe Iſlands are Parcel of the Domi-* " *nions of the Crown of England, they are not Parcel of the Realm of* " *England.* The like Obſervation is made with Reſpect to the *Iſle of* " *Man.*"

Upon this Paragraph his Majeſty's Council Remark, that, they have already ſhewn, that Writs of Error were by the common Law ; and as a further Proof, refer to the Regiſter of Writs, which was undoubtedly compiled before the Conqueſt : This Book, by which moſt of the Writs ſtill in Uſe are framed, contains a great Variety of Writs of Error : The Power of trying Errors has not therefore been aſſumed, but belongs to the King's Courts, from Time Immemorial ; nor can the Maxim *boni Judicis eſt ampliare Juriſdictionem*, mean any Thing more than that Judges are in the Diſtribution of Juſtice, to exerciſe every poſſible Power, which the Law will warrant. And as the Correction of Errors is by the common Law, it extends to all Times and to every common Law Court ; the Diſtinction therefore, that Writs of Error do not lie in the Colonies, which is grounded on the other baſeleſs Diſtinction, that nothing but the antient common Law of *England* extends to the Colonies, muſt alſo appear to be without Foundation ; and the ſuppoſed Neceſſity of an Act of Parliament, to give Writs of Error in certain Caſes, which is in evident Alluſion to the 31ſt of El. Chap. I, whereby the Exchequer is authorized to hear and correct the Errors of

the

he King's Bench, is entirely groundleſs; for nothing is clearer than that efore that Statute, Writs of Error did lie from the King's Bench, to he Houſe of Lords: The Statute therefore was not to give a Writ of Error where it did not lie before; but to carry a Caſe of Errors thro' he Exchequer to the Houſe of Lords, inſtead of removing it immedi-tely to that auguſt and final Tribunal, as was the Practice by the com-mon Law.

Nor does the Argument in Support of the Poſition, that Writs of Error did not lie at the common Law, receive any Weight from the Inſtance aſſigned, concerning Appeals from *Jerſey* and *Guernſey*; for my Lord *Hale*, from whoſe Hiſtory of the common Law, his Honour has probably collected this Inſtance, unfolds the Reaſons upon which an Appeal lies from theſe Iſlands, to the King in privy Council, which are theſe; thoſe Iſlands were Part of the Dutchy of *Normandy*; by the Laws of which Dutchy, an Appeal did lie to the Duke in his Council; and as after the Annexation of that Dutchy to the Crown, the Laws of *Normandy* continued unaltered, and the King of *England*, was Duke of *Normandy*, the Appeal muſt of Courſe be to him in Privy Council.

Beſides, this Inſtance does not ſhew that a Writ of Error, did not lie to thoſe Iſlands, but the Contrary is rather to be ſuppoſed; becauſe they had Trials by Juries, and therefore it is to be preſumed, that an Appeal from their Courts, lies in the ſame Caſes as in the Courts of *England*, *to wit*, on Errors in Law only; in ſhort, my Lord *Hale*, clearly intends to ſhew the Reaſon, why an Appeal lies from thoſe Iſlands to the King in Council, and not the Nature of that Appeal, which muſt be preſumed, if the ſame Word, in the ſame Author, is to be underſtood in the ſame Senſe, to mean in Caſes of Error only: Beſides, as a Proof of this Matter it is certain, that a Writ of Error did lie to the King's Courts at *Calais*, which was not Parcel of the Domi-nions of *England*, but a diſtinct Dominion, dependent on the Crown of *Great-Britain*: Vin. Tit. Error, P. 484, No. 22, 4, Inſt. 282: As to the *Iſle of Man*, it was antiently an independent Kingdom, governed by its own Laws, which have never been changed to this Day; and in that Iſland, a Writ of Error is not known in their Law.

But as a Proof, that whatever the Laws of a dependent State may be, they are not to be changed by Authority of the Crown; it appears in the

the Books, that the Crown can only appoint Judges by Commiſſion, to redreſs Injuſtice and Wrong, according to the Law and Juſtice of the Iſle. 4. Inſt. 285.

The Three next Paragraphs, as they concern the Charters of ſome of the neighbouring Colonies, we ſhall take the Liberty to conſider as one; they are theſe;

" In the Charter unto *William Penn*, of *Pennſylvania*, the following " Clauſe is inſerted, *ſaving and reſerving to us, our Heirs, and Succeſ-* " *ſors, the Receiving, Hearing and Determining of the Appeal or Ap-* " *peals, of all or any Perſon or Perſons*, of, *in, or belonging to the Ter-* " *ritories aforeſaid, or touching any Judgment to be there made or given.*"

" By the Charter of the *Maſſachuſetts-Bay*, the King has reſerved to his " Subjects there, the Right of appealing to the King in his Privy " Council, from the Sentence or Judgment of any Court, or Judicatory " in that Province."

" In *Connecticut*, as I am informed, Appeals to the King are not " reſerved by their Charter; nevertheleſs the Subject there on his Peti- " tion to the King, obtains the Benefit of an Appeal by the King's " Mandatory Writ; Obedience to which has never been refuſed."

Upon theſe Inſtances his Majeſty's Council remark,

1ſt. That the Law of the Land, and not the Practice of other Colonies is to be their Guide; nor can ſuch Practice conclude the Subject's Right in this Colony. It is a known Maxim, *Actus me invito factus, non eſt Actus meus.*

2dly. That tho' the Charters of *Pennſylvania* and *Maſſachuſetts*, reſerve to the King the Right of hearing Appeals, it muſt be in ſuch Manner as the common Law will authorize, that is in Caſes of Error only; and therefore nothing can be argued from the Practice of thoſe Colonies. If they as well as *Connecticut*, have gone into Miſtakes in Law, their Conduct can be no Rule for us, *Fortior enim eſt Diſpoſitio Legis quam Hominis*; and we have his Honour's Declaration at another Time on this Occaſion, that Errors when diſcovered, ought not to be the Ground of future Proceedings, but muſt be corrected. With Reſpect to the *Maſſachuſetts* and *Connecticut*, it is well known that they have

ave, by Laws of their own making, and in evident Deviation from the Laws of *England*, in the Conſtruction of their Courts, given them a Power of Appeal in Matters of Fact, from the higheſt to the loweſt: t is not therefore to be wondered at, that in thoſe Colonies, as well as others, (in which we conceive the Law of *England* is not ſo well nderſtood, nor has been ſo ſtrictly adhered to as in this Colony) they ave run into the erroneous Practice of appealing on Matters of Fact, to he King in Privy Council. And we cannot but be of Opinion, that is Majeſty's Lieutenant Governor and Council, of this Colony, in the Execution of their important Truſt, ought in Obedience to his Majeſty's nſtructions, and the Statute of the 7. & 8. of W. 3. to be guided by the nown and eſtabliſhed Laws of *England*, and not by the uncertain, and erhaps groundleſs Proceedings in other Colonies.

We cannot therefore agree with the Lieutenant Governor, when he ays, in the next Paragraph.

" It is evident from what has been ſaid, that no Writ of Error, can ' by the common Law lie in the Colonies, becauſe they are not Parcel ' of the Realm of *England*. No Act of Parliament has extended ' Writs of Error to the Colonies. The King has not given Authority ' to the Governor and Council of this Province, to hear and determine ' on Writs of Error —— but has given them Authority to hear and ' determine on Appeals; their Authority is therefore clearly confined ' to Appeals, by which the whole Cauſe is brought before them, in ' order that if need be, it may be tranſmitted by farther Appeal, to the ' King in his Privy Council. —— By what Authority, is the Governor ' and Council of *New-York*, appointed Judges in Error? I can ſee ' none — If neither Error nor Appeal lies, the Supreme Court becomes ' uncontroulable."

In Oppoſition to which, his Majeſty's Council are of Opinion, that Writs of Error did lie by the common Law, and that no other Writs, than Writs of Error, would lie by the common Law, from the inferior Dominion; becauſe the Latter is not Parcel of, but depends on the Former; and that they lie *ex Neceſſitate*, becauſe the Law may not be changed, nor the Prince govern the inferior Dominion, which he holds *Jure Coronæ*, otherwiſe than by the Laws of the ſuperior Dominion: That the Power of this Court, does not alone depend on his preſent moſt graciour Majeſty's

Majeſty's Royal Inſtructions, but was conferred in its original Conſtitution, by the Inſtructions of his royal Progenitors, and Predeceſſors, by which we are expreſsly and only authorized to take Cognizance, of Caſes of Error. That the Court being thus conſtituted, no Writ was neceſſary to be expreſsly directed, by royal Inſtructions, for *Quando aliquid mandatur, mandatur et omne, per quod pervenitur ad illud.*

That his preſent Majeſty's Inſtruction, has a neceſſary Relation to former Inſtructions, becauſe it concerns a Court, which had a Being before the iſſuing of the preſent Inſtruction ; and becauſe it has a neceſſary Reference to the antient Practice of this Court, *in directing the uſual Writ to be iſſued* ; that this Court has no Authority to hear, and determine on Appeals not known in the Law ; and by Writ of Error, the Judges of the Supreme Court will be effectually controuled ; becauſe by the Law of the Land, they can only err in Matters of Law, upon which either a Demurrer, ſpecial Verdict, or Bill of Exception, will in all Caſes furniſh this Court in the Exerciſe of its proper Juriſdiction, with every Opportunity of correcting their Miſtakes in Law.

But as his Honour has thought proper, to conſider more particularly what was offered by thoſe Judges in Conſtruction of his Majeſty's 32d Inſtruction, it will be proper to ſet forth the Paragraphs on that Head, and give them a particular Anſwer ; they run in theſe Words :

" What has been ſaid I think ſufficient—But to remove all Diffi-
" culties I can on this Head, I ſhall next conſider the Conſtruction,
" which the Judges of the Supreme Court have put on the King's In-
" ſtruction ; for their Purpoſe they have gone back to preceding
" Inſtructions ; tho' I think that no Argument from thence can be con-
" cluſive. It is ſaid that the Words, *in Caſe of Errors*, being added
" in the former Inſtructions, after the Word *Appeal*, the Senſe of this
" laſt Word muſt be reſtrained to ſhew, that the Deſign of the In-
" ſtruction is to confine the Governor and Council to the Rules obſerved
" on Writs of Error. But in Law, the Word Appeal has a certain
" and determined Signification : The Word Error is often taken gene-
" rally to ſignify any Miſtake, and it cannot be confined to the Senſe
" in which Error, is uſed in a Writ of Error, ſince no Writ of Error
" lies in the Colonies."

" The next Argument, is from the following Words, in the Inſtruc-
" tion, *to iſſue a Writ in the Manner, which has been uſually accuſtomed:*

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" The Meaning muſt certainly be in the Manner uſually accuſtomed in " Appeals, not in the Manner uſually accuſtomed in this Place, as is " pretended; for when the firſt Inſtruction was given, there could be " no accuſtomed Manner in this Place, and it cannot at any Time be " intended, if the accuſtomed Manner was erroneous as it certainly is, " if it be by Writ of Error. Beſides, the Uſage in this Place is ſo " weak, and of ſo ſhort Continuance, that it can be of no Force."

" But that the Word Appeal, in the Inſtruction, is taken in its pro- " per Senſe, is evident from the other Words in the Inſtruction, which " cannot he applied to a Writ of Error, viz. *Appellant* and *Appellee*, " Terms never uſed on a Writ of Error, and the Word *Condemnation*, " which indicates a new Judgment on the Merits."

His Majeſty's Council have already remarked, that this Court was not erected by his preſent Majeſty, but was many Years ago, erected and confirmed as a Court of Errors in expreſs Terms, by his Majeſty's royal Predeceſſors and Progenitors: In this View it was a proper common Law Court, at the Time when his preſent Majeſty iſſued his royal Inſtruction.

And therefore, tho' we agree that the Word Appeal, has in Law a certain and determined Senſe, yet as that Word in its legal Senſe, is neceſſarily confined to Matters of Law, and as his Majeſty's Council dare not give into ſo bold an Opinion, that his Majeſty by his Inſtruction, *intended to change the Law, and introduce Appeals upon Matters of Fact, unknown to the Laws of England*; they think it their Duty to underſtand the Word *Appeal* in the preſent, as the Word *Appeal*, in Caſes of Errors ought to be underſtood in the former Inſtruction: And tho' his Honour does not underſtand the Word Errors, in the former Inſtructions, as having any Relation to Writs of Error, but in the vulgar Senſe as ſignifying any Miſtake, whether in Law or Fact; yet we cannot but be of Opinion, that the Word ought to be taken in its legal Senſe; becauſe any other Appeal is not known in the common Law, than an Appeal for Errors in Law, and we think it our Duty to make the Law, and not vulgar Practice, the Rule for conſtruing as well the former, as the preſent royal Inſtruction; and that the more particularly, becauſe the very Purport and Deſign of both, appear to be the Correction of the Judgments of the Courts of Law, for which Reaſon the Judges of thoſe

Courts

Courts are expreſsly prohibited from voting in the Court of Appeals, tho' they may attend to aſſign the Reaſons of their Judgments; and this not only proves (as the Judges have juſtly obſerved) that the Appeal intended in his Majeſty's 32d Inſtruction, muſt be on Matters in which they are incompetent, by having rendered their Judgment already, *to wit*, on Matters of Law, but alſo that the Appeals directed being from Courts of Law, and from the Judgments of thoſe Courts, in the rendering of which Judgments there cannot in the Nature of Things be any thing corrigible, but Errors in Law; the Words *Appeal* in *Caſes* of *Errors*, in the old Inſtruction, and the Word *Appeal* in the preſent Inſtruction, muſt be underſtood in the ſame Senſe. Nor can we think it juſt to attempt to prove that the Word *Errors* in the old Inſtruction is not to be taken in its legal Senſe, by aſſerting, that Writs of Error do not lie in the Colonies, becauſe, whether they will lie or not, is to be determined by that Inſtruction. For if thereby a Court of Errors is eſtabliſhed, as it clearly is, the Writ of Error is of Courſe given by neceſſary Implication, agreeable the Maxim already mentioned; *Quando aliquid mandatur, mandatur, & omne per quod pervenitur ad illud*, and another Maxim to the ſame Effect, *quicunque aliquid alicui concedit, concedere videtur, et id ſine quo Res ipſa eſſe non poteſt*, and it is evident, that Writs of Error are eſſential to Courts of Error, becauſe they can exerciſe no Juriſdiction in Errors, but by a Writ of Error, to bring the Cauſe before them.

What his Honour has been pleaſed to remark, on the Clauſe in his preſent Majeſty's Inſtruction, whereby the Governor or Commander in Chief is directed to iſſue, *a Writ in the Manner which has been uſually accuſtomed*, might be fully anſwered, by ſimply obſerving, that tho' we ſhould agree with the Lieutenant Governor, that thoſe Words muſt intend in the Manner uſually accuſtomed in Appeals: Yet as the common Law knows of no other Appeals than for Errors in Matters of Law, the Writ uſually accuſtomed by the Law of *England*, muſt be the Writ intended, which in Appeals from Courts of Record is a Writ of Error.

But beſides this, it may not be amiſs to obſerve, that his Honour's reaſoning on this Head, is grounded on a palpable Miſtake in Fact; for the old Inſtruction does not contain ſuch a Clauſe as he ſuppoſes.

The Chain of reaſoning therefore on this Point is juſtly this; by the old Inſtruction a Court of Errors is expreſsly erected, and conſequently the ſame Inſtruction gives a Writ of Error by neceſſary Implication; the

Court

Court of Appeals ſpoken of in the preſent Inſtruction, muſt neceſſarily be the Court of Errors mentioned in the old Inſtruction, becauſe it directs the accuſtomed Writ, and therefore the accuſtomed Writ mentioned in the preſent Inſtruction, muſt neceſſarily intend the Writ of Error implicitly given by the other, and uſed in Conſequence thereof, in a Courſe of Practice for many Years: So that there can be no Reaſon to ſuppoſe that the Writ which has been uſually iſſued was erroneous; or that the iſſuing of that Writ at preſent, muſt depend ſolely on what he ſuppoſes to be the ſhort, tho' continued Uſage in this Colony.

And that Appeals for Error will lie in the Colonies, and that the Practice of bringing them has been long ſince uſed in the Colonies, and approved of by the King in privy Council, will appear from the Caſe of one *Jeoffry Jones*, which was an Ejectment for Lands, brought in the Reign of King *William* III. in *New-Jerſey*, and in which Cauſe a Verdict was found and Judgment given, and the Judgment was on an Appeal to his Majeſty in privy Council, afterwards reverſed for Error.

Hence therefore the Argument drawn from the Words *Appellant* and *Appellee* in the royal Inſtruction, muſt be of little Weight; for beſides that the old Inſtruction, which expreſsly, and only relates to Caſes of Error, contains the ſame Words, it is evident, that if, in Law, the carrying up of a Cauſe by Writ of Error, is an Appeal, the Party Plaintiff muſt be the *Appellant*, and the Defendant the *Appellee*: Nor will the Word *Condemnation*, in the Inſtruction, furniſh the leaſt Argument in Favour of the Lieutenant Governor's Conſtruction; becauſe, by that Word, is indiſputably intended the Judgment in the Court below, as will appear from the whole Clauſe, which directs, that the Appeal ſhall be allowed, if the Party Appellant gives Security; (1ſt) to proſecute his Appeal to Effect: 2dly, to anſwer the Condemnation, and pay the Damages and Coſts, if the firſt Sentence be affirmed. His Honour next proceeds to conſider ſome, and not the moſt concluſive Arguments urged by the Judges, *ab inconvenienti*, upon which he Remarks thus;

" The next Arguments againſt Appeals are from Inconveniency; tho' " they be not material, yet as they may have more Weight than they " ought to have, they deſerve a diſtinct Anſwer.

" The firſt is from the great Expence Appeals muſt occaſion; to this " may be anſwered, that in the Colonies, where Appeals are in Uſe, and where

" where preparatory to an Appeal, the Evidence of Witneſſes is at the De-
" ſire of either Party taken down in Writing, in the common Law
" Courts, the Expence is not near ſo great, as in common Suits in this
" Province; this Expence then muſt be owing to ſome other Cauſe.

" It is again objected, that if Appeals be allowed, the Governor
" and Council, and afterwards the Privy Council in *England*, muſt ſit
" every Day in the Year, to hear and determine them. —— The Supreme
" Court in this Province ſits at moſt only ſix Weeks, in the whole
" Year; ſuppoſe an Appeal in every Cauſe, (an abſurd Suppoſition)
" the Trial on Appeal cannot take up ſo much Time as in the Supreme
" Court, for the Formalities to bring the Cauſe to Iſſue, are unneceſ-
" ſary in judging on the Merits."

With Reſpect to his Honour's Remarks upon the Argument drawn from the Expence that would attend Appeals, in the *Pretorian* Way, it may be anſwered; that tho' the Proſecution of common Suits, in the neighbouring Colonies, is leſs expenſive than in this Colony, yet we are far from believing, that the Charge of proſecuting an Appeal in thoſe Colonies would be leſs expenſive, than the Trial of an ordinary Cauſe in this. And though the Law is generally cheaper in ordinary Caſes, in thoſe Colonies, than in this, yet we conceive that the little Expence which there attends a common Suit, is one of the greateſt Evils under which they labour; as by that Means great Encouragement is given to a litigious Spirit, and has been ſo far improved to the Diſadvantage of the Colony of *Connecticut*, that Three Thouſand Six Hundred Writs have been returned at the Seſſions of one of their County Courts; which we believe may be truly ſaid, to exceed the Number of Writs that are iſſued *communibus Annis* by all the Courts of this Colony, from the higheſt to the loweſt. But at the ſame Time we are of Opinion, that tho' the great Cheapneſs of Law is a real Diſadvantage to any Country; yet we think that the Encouragement of Appeals in the *Pretorian* Way, would be an Expence too exceſſive to be born by the Subject; and therefore would furniſh juſt Ground for the Argument *ab inconvenienti*.

The Argument urged by the Judges, from the Inconvenience that would attend a continual Seſſion of the Governor and Council, and of the King in privy Council, for hearing and determining Appeals, we think has been greatly miſunderſtood; for with Reſpect to the Governor and Council

Council, if they are to be a Court of Appeals in the Senſe contended for by his Honour, they muſt take Cognizance not only of Appeals from the Supreme Court, but from all the Circuit Courts, County Courts, City Courts, and Borough Courts, throughout the Colony, which would completely furniſh them with Buſineſs for the whole Year; and, as to Appeals to his Majeſty in privy Council, if they were permitted to lie on Matters of Fact, from all the numerous Colonies in his Majeſty's Dominions, it is not to be doubted that the privy Council would be obliged to ſet every Day in the Year, to hear and determine them.

But his Honour has in his Reaſons omitted the Conſideration of thoſe of the Arguments *ab inconvenienti* which have the greateſt Weight. We cannot however avoid concluding with the Judges, that the Appeal contended for, would render the Expence of Trials by Jury uſeleſs, and therefore intolerable, and by making the Cauſe on Appeal, *Res integra*, would open a Flood-Gate to Perjury, encourage a Spirit of Litigiouſneſs, and introduce Idleneſs, to the Ruin of many Families, and the great Impoveriſhment of the Country, and would be attended with the utmoſt Danger to the Subject, in the Tranſmiſſion of original Deeds; the Inſpection of which is often Times abſolutely neceſſary (as where a Razure is the Gift of the Controverſy) in Order to do Juſtice to the Cauſe: Beſides this, the Benefit of a View not only appointed by the common Law, but by Statute, in Land Trials, would be loſt to the Subject, on every ſuch Appeal. And therefore, as long as there is any truth in the Maxim, *quod eſt inconveniens & contra Rationem, non eſt permiſſum in Lege*, an Appeal on Matters of Fact, being attended with theſe Inconveniencies cannot lie.——

His Honour proceeds next, to conſider what he allows to be the principal Objection againſt an Appeal on Matters of Fact, on which he ſpeaks thus.

" I come now to the principal Objection, and which has the greateſt Weight, that by Judgment on Appeals, the great Privilege of Trial by Jury is taken away, *the great Privilege which Engliſhmen enjoy above all other Nations*: On this Head ſeveral Things deſerve Conſideration."

1ſt. " The Character of the Perſons who Judge on Appeals; the " Gentlemen of the Council in this Province, and the privy Council " in *England*, where on hearing of Appeals, the Lord high Chancellor,

" the

" the Chief Juſtices of both Benches, and the Lords of greateſt Skill " and Knowledge in the Law, uſually attend: With ſuch Judges, the " Verdict of the Jury will always have its juſt Weight: Few Men in " any difficult Caſe would not rather truſt to ſuch Judges than to the " uſual Juries in this Country. It is evident from the 33d Inſtruction, " that the King really intended the Benefit of his People, not any Ad- " vantage to himſelf, by ordering Appeals; for the 33d Inſtruction, " gives an Appeal in Caſes of exceſſive Fines in a leſs Sum, than in " Caſes of Property: And the King muſt have deſigned that the Me- " rits of the Cauſe ſhould come before him by the Appeal, otherwiſe he " cannot Judge whether the Fine be exceſſive or not.

" I believe that there is not a Man in this Province converſant in the " Courts of common Law, who will not allow, that many iniquitous " or falſe Verdicts have been given in it, and thereby great Injuſtice " done. By the Laws of *England* every Wrong has its Remedy; what " is the Remedy in this Caſe? They tell us the Judge will give a new " Trial: But this Remedy depends upon the Will and Pleaſure of the " Judge; if he will not, the Subject has no Remedy. The Law of *En-* " *gland* abhors all arbitrary Power, and therefore the King has given his " Subjects in the Colonies a Right to Appeal from every iniquitous " Verdict, without depending on the good Will or Pleaſure of any " Judge. If no Appeals are allowed from the Supreme Court of *New-* " *York*, the Court muſt become uncontroulable; however agreeable " this may be to Judges fond of Power, it muſt be terrible to the Peo- " ple under their Juriſdiction."

His Majeſty's Council are ſeriouſly of Opinion, that the Privilege of Trials by Juries, which *Engliſhmen* enjoy above all other Nations, is *in Truth a great and excellent Privilege*: It is a Privilege which ſtands recommended by the Experience of many Ages, and by the tendereſt Regard of our Anceſtors, for whoſe Judgment we have the higheſt Veneration: It is in ſhort the Birth-right of every *Britiſh* Subject, and ought to be maintained with the moſt unrelenting Firmneſs: But what is ſtill more, it ſtands fixed, irrevocably fixed, by the known and eſtabliſhed Laws of the Land, which the moſt cogent Reaſons can never enable a Governor and Council to alter. Little therefore will it avail in Favour of an Appeal, that the Characters of thoſe who would in ſuch Caſe be the Judges, are conſpicuouſly eminent and unexceptionable, or that iniquitous Verdicts are ſometimes given by Juries, or that Men in a difficult

Caſe

Caſe would rather ſubmit their Property to the Judgment of the Former than the Latter; for beſides, that none can be ſo competent Judges of the Matters of Fact as thoſe of the Neighbourhood, who are acquainted with the Parties, and the Witneſſes, and often Times with the Matter in Controverſy itſelf; and beſides alſo the great Security to the Subject, which conſiſts in ſubmitting the Trial of Facts to one Set of Men, and the Determination of the Law upon thoſe Facts to another, (which are Reaſons that at firſt View give a Preference to Trials by Juries) the Impoſſibility of a Change, even in Favour of a Method, if any ſuch could be deviſed, that would deſerve a Preference, muſt be a ſufficient Anſwer to any Thing that can be offered on this Head. The Governor and Council are *Jus dicere & non Jus dare*, and their judicial Capacity ſeems to have been deſigned in the original Conſtitution of this Colony, and in Imitation of the Houſe of Lords, as the dernier Reſort in the Colony, ſubject however to the Correction of a ſuperior Judicatory in *England*, as eſſentially neceſſary for the Preſervation of our Dependence; nor can the Crown (we ſay it with the moſt profound Submiſſion) change the Law of the Land, becauſe the King can do no Wrong. Any Thing ſhort of Legiſlative Authority, would be inadequate to ſo important a Purpoſe, and tho' his Majeſty may have thought proper to grant Appeals in Caſes of Fines, and that perhaps in the Senſe contended for by the Lieutenant Governor; yet, this is not in Derogation of the Rights of the Subject, but the Effect of his Majeſty's Royal Clemency. By the Policy of Law, all Fines belong to the Crown, and as the King may remit them when he pleaſes, either in Part or in the Whole, he may without affording them any Cauſe of Complaint, and in Eaſe of the Subjects, direct ſuch a Method of enquiring into the Merits of the Cauſe, as he thinks proper, to enable him to judge on the *Quantum* of the Fine impoſed.

With Reſpect to unjuſt or iniquitous Verdicts, the common and Statute Law of *England*, as well as the Practice of the King's Courts, have provided ample Security againſt them; for beſides the Remedy by new Trials which his Honour ſuppoſes to be inadequate to the Evil, becauſe it depends upon the Will and Pleaſure of the Judge; the heavy Sentence which the Law inflicts by Attaint upon Juries who give iniquitous Verdicts, muſt be an effectual Redreſs; the Verdicts impeached by Attaint, being Matters of Fact, are corrected by another Jury of Twenty-four Men, and the Manner of the Correction proves the ſtrict Attachment of the Law to the Rule, *ad Quæſtionem Facti, reſpondent Juratores*, the

the Reverſal of the Judgment given in the firſt Inſtance, which is always the Conſequence of an Attaint proſecuted with Effect, furniſhes the moſt ample Security to the Subject, and ſatisfies the Demands of the Laws of *England*, *which abhor all arbitrary Power*.

The evil Conſequences of diſhoneſt Verdicts being therefore ſo effectually guarded againſt by Law, we cannot be of Opinion that his Majeſty ever intended by a Deviation from the eſtabliſhed Law of the Land, to give his Subjects in the Colonies a Right to Appeal from iniquitous Verdicts, in a Method unknown in the Law, and never applied in Eaſe of the Subjects in the Mother Country, who are doubtleſs entitled to an equal Share of the Royal Favour with his Majeſty's American Subjects; and that in every Inſtance of Practice, wherein Errors in Fact are to be corrected, the Office is by Law impoſed on a Jury of the Country, is manifeſted in every Caſe of Error, *Quod coram vobis reſidet* ; for when a Man aſſigns Errors in Fact, he ought to put himſelf upon the Country, for the Jurors ſhall only be Triers of that, and not the Judges, Yelv. 58. Law of Er. 10.

And on *audita Querela*, which is alſo grounded on Matter of Fact, a Jury is ever to determine ; as if a Releaſe of a Debt given after Judgment, is alledged by the Party in Bar of Execution, a Jury muſt try the Fact, whether the Releaſe was executed or not.

In ſhort, the common Law knows of no other Appeals on Matters of Fact from common Law Courts, than by Attaint, Error, *Quod coram vobis reſidet*, and Writ of *audita Querela*, on all which, Juries determine ; while on the other Hand, a Cauſe of Errors in Law is never brought before the Judges, but by *Writ of Error*, *falſe Judgment*, *or Certiorari*, and from Courts of Record, ſuch as our Supreme Court is, by Writ of Error only, 2. *Bacon*, *Abr. Title Errors* 189.

His Majeſty's Council are far from maintaining that no Appeals ſhould be allowed from the Supreme Court of *New-York*, nor can we believe that the Judges of that Court did ever affect ſo dangerous an Exemption ; on the Contrary, we are of Opinion with thoſe Judges, that *Appeals by Writs of Error*, will undoubtedly lie from their Judgments, *and will effectually prevent that Court from becoming uncontroulable*.

The Method of Trials by Juries we think of ſo much Conſequence, that we cannot diſmiſs the Subject, without animadverting on the Cloſe of his

his Honour's Reaſons, which were they well grounded, would naturally bring this excellent Method of Trial into Diſcredit. His Words are theſe ;

" Many of the Counties of *England*, tho' they be not of ſo great Ex-
" tent of Territory, are more conſiderable in Numbers of People, Dig-
" nity of Perſons, and Value of Property, than this Province is ; there-
" fore all the Inconveniencies may happen in this Province, which did in
" the Counties of *England*, while all the Property in thoſe Counties
" were determined by Judges of the ſame County. I ſhall recite them
" in the Words of Lord Chief Juſtice *Hale*, *viz.*

" All the Buſineſs of any Moment was carried by Factions, and Par-
" ties: For the Freeholders being generally the Judges, and converſing
" one among another, and being as it were the Chief Judges, not only
" of the Fact, but of the Law ; every Man that had a Suit there, ſped
" according as he could make Parties, and Men of great Power and In-
" tereſt in the County, did eaſily overbear others in their own Cauſes,
" or in ſuch wherein they were intereſted, either by Relation of Kindred,
" Tenure, Service, Dependence, or Application ; the Remedy againſt
" theſe Evils which then prevailed, was by Appeal to the King."

Upon this we obſerve:

That the Evils thus complained of by Lord *Hale*, happened in a very remote Period, when Ignorance and Barbarity overſpread the Nation in general ; in the Reign of *Henry* II. which commenced above 600 Years ago, Learning was wholly ingroſſed by the Lawyers and the Clergy ; the Freeholders of the Counties who were the Suitors to the inferior Courts, were both Triers of the Facts, and ſole Judges of the Law ; and in Courts where Ignorance preſided, and the Judges were of inferior Rank, and owed this Service by the Tenure of their Eſtates under the meſne Lord, it was not to be wondered at, *That Buſineſs was carried by Parties and Factions, nor that every Man ſped in his Suit according as he could make Parties, or had Intereſt in the County* ; but that the Ignorance of the Judges, and not the ill Conſequence reſulting from Trials by Juries, is the Evil complained of by Lord *Hale*, appears clearly from the Account he gives in the ſame Page, of the Method taken by the King to Redreſs the Evil ; *therefore* ſays the Author, " The King took another and more effectual Courſe,
" for in the 23d Year of his Reign, by Advice of his Parliament, held at

Hale's Hiſt. of Com. Law. 140.

" at *Northampton*, he inſtituted Juſtices *itinerant*, dividing the Kingdom " into ſix Circuits, and to every Circuit, allotting three Judges, *know-* " *ing or experienced in the Laws of the Realm.*" Nor can it be thought probable, that ſo eminent and able a Judge as Lord *Hale*, could be ſo inconſiſtent with himſelf, as to diſparage a Method of Trial, which he has taken Pains to diſplay in every poſſible advantageous Point of Light; and for this Purpoſe, has devoted a whole Chapter in his excellent Book, called, *The Hiſtory of the common Law of England*; a Chapter ſufficient to convince every reaſonable Man, of the peculiar Advantages attending the moſt excellent Method that ever was deviſed by human Prudence, for the Trial and Determination of all Facts. *See Chap.* 12.

To ſum up the Whole, his Majeſty's Council are clearly of Opinion, 1ſt. That omitting the Defects contained in the Inſtruments under Seal, by which an Appeal is ſought in the preſent Caſe, an Appeal from the Verdict of a Jury, taking the Word in any Senſe, is not known in the Law of *England*, it having been the eſtabliſhed and continual Practice, from Time immemorial, to try and determine all Facts by Juries.

2dly. That the Statute of the 7 and 8 W. III. has erected the Laws of *England*, which were in Force at the Time of the Settlement of this Colony, as the Standard of Law in the Colony. 3dly. That his Majeſty's Inſtruction, in which the Governor or Commander in Chief is directed to take Care, that no Man's Life, Members, Freehold, or Goods be taken away, or harmed, otherwiſe than by eſtabliſhed and known Laws, not repugnant to, but as much as may be, agreeable to the Laws of *England*, (which is ſimilar to every Inſtruction hitherto known to us, that has been iſſued on that Subject ſince the paſſing of that Statute) is ſupported by the aforeſaid Statute, and is calculated to enforce an Obedience to it.

4thly. That in Conſequence of the aforeſaid Statute and Inſtructions, not only the Laws of the Colony, but the Practice of it's Courts, have always been in the ſtricteſt poſſible Conformity to the Laws of *England*, and the Practice of the King's Courts there.

5thly. That an Extention of the Laws of *England*, and the Practice of the King's Courts there, as transferred to this Colony by the ſaid Statute, and enforced by the aforeſaid Inſtruction, has been further enforced by ſolemn Adjudication before the King in privy Council.

6thly.

6thly. That the Terms of his Majeſty's 32d Inſtruction, have a neceſſary Reference to ſuch Appeals as were known to the Law of *England*, and had been long uſed in this Colony ; and that no other Appeals than in Caſes of Error in Law (which are the only Caſes of Appeal provided for in former Inſtructions) have, until the preſent Inſtance, ever been brought here.

7thly. That the Appeal intended by the ſaid 32d Inſtruction, muſt from the Words of the Inſtruction themſelves, neceſſarily be an Appeal from the Judgment of the Judges in Matters of Law, and that if the Inſtruction had intended an Appeal from the Verdict of a Jury, in the forming of which, the Judges are never concerned, they, as being the moſt competent Judges of a Verdict founded on Evidence given before them, would never have been excluded from ſitting in the Court above.

8thly. That tho' ſtrictly ſpeaking, there are ſeveral Species of Appeals known in the Law, which are therefore generally called by their peculiar Names, yet the Inſtances are numerous in the Books, to prove that the carrying up of a Cauſe by Writ of Error, is in Law called an Appeal.

9thly. That wherever an Appeal is on Matters of Fact, as in *Attaint*, *audita Querela* and Error, *Quod coram vobis reſidet*, the Errors are corrected, not by the Judges, but by the Inqueſt of a Jury.

10thly. That therefore, a Departure from the eſtabliſhed Law of the Land, in giving ſuch a Conſtruction to the Terms of his Majeſty's 32d Inſtruction, as would make this Court cognizant of the Cauſe, as it is now attempted to be brought before us, that is, *on Errors in Fact*, would do Violence to the true Senſe of this, as well as the other Inſtruction of his Majeſty, by which conſtitutional Juriſdictions, and the ſame Meaſures of diſtributing Juſtice, as are eſtabliſhed in *England*, are clearly intended to be transferred to this Colony.

11thly, and LASTLY. That Appeals on Matters of Fact, would not only be inconſiſtent with Law, the Royal Inſtructions, and the ſtanding Practice of this Colony, but would be burthenſome and ruinous to the Subject, by rendering the firſt Trial uſeleſs, procraſtinating Juſtice, enhancing the Coſts of Suit, and opening a wide Door for Perjury on the ſecond Trial.

And

And in Caſes wherein the Deciſion would turn upon an Inſpection of Deeds, would render it impoſſible to adminiſter Juſtice in the laſt Remove, without ſubjecting the Party to the utmoſt Danger of loſing the moſt valuable Evidence of his Title; and in Cauſes wherein Views may be neceſſary, would deprive the Subject of the Benefit ſecured to him by Law. And for theſe Reaſons, we are of Opinion, that this Appeal cannot be received.

ORDERED,

That the further Reaſons of Mr. Juſtice *Livingſton*, offered on Wedneſday laſt, in Support of his former Opinion in this Cauſe, be entered in the Minutes; which are as follow:

May it Pleaſe your Honours,

BEFORE your Honours proceed to determine the moſt important Point that ever was before any Court in this Province; a Point on which the Rights of the People, and conſequently the future Proſperity of this Colony in a great Meaſure depend;

I beg you would indulge me with a few Words, in order to confirm what I have already ſaid, when in Compliance with your Requeſt I gave you the Reaſons of my Conduct. Your Honours are ſenſible that this Battery, raiſed againſt the Laws by which we have been ſo long governed, and a ſettled Practice which has obtained for ſo great a Number of Years, and which is exactly conformable to the Practice in *England*, is founded on the ſingle Word *Appeal* in the 32d Inſtruction; and on the *Suppoſition*, that nothing elſe could be underſtood by it but ſuch Appeals as are agreeable to the Practice of civil Law Courts: For if it was poſſible to underſtand it in any other Senſe, no one would ſuppoſe that the whole Syſtem of our Law, which has been built up by the Wiſdom of ſo many Ages, was intended to be overturned by this ſingle Word. In order to ſhew how groundleſs this Suppoſition was, I obſerved to your Honours, that Writs of Error, and the ſeveral other Reliefs provided for by the Laws of *England*, againſt a Judgment, were properly termed Appeals; tho' that Word was but ſeldom uſed, for the Reaſons I then mentioned. And for Proof, I relied on the authority of Dr. *Cowel*: I own this Authority to be but ſlender, becauſe he was more of a Civilian than a com-

mon

mon Lawyer ; but as I was but juſt returned from the Country, and had but little Time amidſt the Multiplicity of Buſineſs which a long and unexpected Abſence crowded upon me, to prepare for this extraordinary Occaſion, it was the beſt I could then produce, tho' I was ſure what I aſſerted was well founded. I could indeed have produced ſeveral other Dictionaries, but as they all made Uſe of the very Words of *Cowel*, and referred to no Authorities, I laid no great Streſs on them. I have now an Opportunity of confirming what I then ſaid, by one of the beſt Authorities in the Law, my Lord Chief Juſtice *Hale* : And for that purpoſe I beg Leave to read two Paſſages in his Hiſtory of the common Law, Page 150, and Page 48. [Here they were read.] Theſe Authorities I ſuppoſe will be a full Confirmation of what I have advanced ; and will ſhow that this Appellant is very much miſtaken in his Explanation of this Inſtruction.

For let it be admitted, as I think it certainly muſt after what I have ſhewn, that there are Appeals at common Law as well as in the civil Law, is it not evident to a Demonſtration, that when it ſays you ſhall admit Appeals from the Courts of common Law, that it muſt mean ſuch Appeals as are known to the common Law ? And if Writs of Error are called Appeals in the common Law, to prove which an unexceptionable Authority has juſt been produced, and the Inſtruction ſays, that for the Purpoſe of Appeals, you are to iſſue a Writ in the Manner which has been uſually accuſtomed ; does it not appear clear as the Sun, that Writs of Error, or ſuch Writs as are known to the common Law, are hereby directed to be iſſued ? The contrary Explanation muſt appear to your Honours very unnatural, *to wit*, tho' there are Appeals by the common Law, as well as in the civil Law, yet, when it ſays you are to admit Appeals from *common Law Courts*, it means you are to admit them in the *civil Law Form*. It means you are to direct the common Law Courts to change the whole Form of their Proceedings in order to comply with the Inſtruction, and to form a motley Court which ſhall partake of the Inconveniencies of both the others, and enjoy the Advantages of neither. It means when it directs you to ſend the uſual Writ, that you ſhall ſend ſuch a Writ, as both for Matter and Form never was ſent to any common Law Court before. It muſt be evident then, that this can never be the Meaning of the Inſtruction.

Since your Honours have indulged me thus far, I beg Leave to read a few Lines farther in the ſame Book. The ſecond Reaſon this great

Lawyer gives, why Cauſes ſhould not come before the Parliament, in the firſt Inſtance is, becauſe by that Means the Subject would loſe his Trial *per Pares*, and conſequently his Attaint, in Caſe of a Miſtake in Point of Iſſue or Damages, to both which he is intitled by Law. Here we ſee Chief Juſtice *Hale* poſitively ſays, that the Subject is intitled to a Trial by his Equals, that is, by a Jury, and alſo to his Attaint in Caſe of a Miſtake in Point of Iſſue or Damages. If this be a good Reaſon in the Caſe here mentioned, it is alſo a good Reaſon againſt trying the Merits of Verdicts in the Court pretended to be erected by this Inſtruction; for tho' this does not deprive the Subject of a Trial by a Jury, yet it does much worſe, it puts him to all the Inconveniencies of that Trial, renders it prodigiouſly more expenſive than ever; and then makes it entirely uſeleſs. And it takes away the Remedy by Attaint, which is alſo here ſaid to be the Subject's Right; for to what Purpoſe would it be to bring an Attaint againſt a Jury for giving a Verdict, which whatever it may coſt, is not worth one Farthing to either Party, ſince the Matter muſt be finally determined by another Set of Judges; who for all Matters of Moment will become the ſtanding Jury in all Caſes without being liable to any ſuch Penalty. And thus we ſhould be deprived of Privileges which his Honour agrees with every Body elſe we ought to enjoy, becauſe they are ſuch as we are intitled to by the common Law, in the moſt confined Senſe of the Word.

'Tis true it may be ſaid, that the Right to bring an Attaint is not to be conſidered, becauſe in a very long Series of Years, no ſuch Action has been brought. But it cannot be denied, that the Privilege of a Subject to the Laws of *England* is very great, in this, that he cannot be diveſted of any Part of his Property but by the Judgment of his Peers, and they not only under the ſacred Obligation of an Oath, but alſo under the Danger of an Attaint if they give a falſe Verdict. And this is a Privilege no Man in his Wits will ever willingly part with, who knows its Value.

For whatever Contempt may be put on Juries, in the Law they are of the higheſt Eſtimation, and no one ought to pretend to be wiſer than the Law. The greateſt Men have ever valued it as the beſt Way of trying Facts. And the Lord Chancellor himſelf, when a Fact is in Iſſue before him, delivers it to the King's Bench to be tried by a Jury. But the Advantages of this Trial by Juries, are ſo well deſcribed by Chief Juſtice *Hale*, in his 12th Chap. of the Hiſtory of the common Law, already read in this Court, that I dare not preſume to do Injury to the Subject, by Encomiums unworthy of its Excellency. This

This Chief Juſtice, on whom no Man who has not made the Law his Study, ought to be aſhamed to pin his Faith, prized Trials by Juries ſo highly, that in order to ſhew the Excellency of the common above the civil and other Laws, he pitches upon this and Deſcents, as two of its principal Perfections.

Therefore, your Honours will put too great a Value on this Privilege, to regard, in determining this moſt important Point, what is done in other Colonies; becauſe, they have no Power to alter our Laws. If Cauſes are brought up by Way of Appeal from Verdicts in ſome of them; if two or three contradictory Verdicts are taken in the ſame Cauſe in others; your Honours will clearly ſee the Abſurdity of ſuch a Practice; and while you leave them to plead either Ignorance or Neceſſity for not conforming to the Laws of *England*, expreſsly enjoined by his Majeſty's Inſtructions to his Governors, you will zealouſly ſupport, according to his moſt gracious Majeſty's Intentions, and Favour to us, every Practice conſonant to thoſe wholeſome Laws.

Neither is this Appeal in any Manner favoured by *Magna Charta*, and therefore nothing ſurpriſed me more than to find that quoted in Favour of an Appeal. The Clauſe *nulli vendemus, nulli negabimus, aut deferemus Juſtitiam*, does no more prove that the King is to try every Cauſe himſelf, than every Writ or Pleading does, which ſuppoſes him preſent in all his Courts of Juſtice. This appears from my Lord *Coke*'s Comment on thoſe Words. And to ſhew how little *Magna Charta* favours ſuch an Appeal as this, I will read the whole Clauſe from which theſe Words are taken, and a Part of my Lord *Coke*'s Comment upon it. The Clauſe runs thus, *Nullus liber Homo capiatur, vel impriſonetur, aut diſſeiſiatur de libero Tenemento ſuo, vel Libertatibus, vel liberis Conſuetudinibus ſuis; aut utlagetur, aut exuletur, aut aliquo Modo deſtruatur; nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale Judicium Pariumſuorum, vel per Legem Terræ; nulli vendemus, nulli negabimus, aut deferemus, Juſtitiam, vel rectum.* On which my Lord *Coke* ſays, "againſt this antient and fundamental Law, and in the Face thereof, I find an Act of Parliament made, that as well Juſtices of Aſſize as Juſtices of Peace, without any finding or Preſentment by the Verdict of twelve Men, upon a bare Information for the King before them made, ſhould have full Power and Authority by their Diſcretions, to hear and determine all Offences and Contempts committed or done by any Perſon or Perſons, agiainſt the Form, Ordinance and Effect of any Statute made and not

not repealed, &c. by Colour of which Act ſhaking this fundamental Law, it is not credible what horrible Oppreſſions and Exactions to the Undoing of infinite Numbers of People were committed by Sir *Richard Empſon*, Knight, and *Edmund Dudley*, being Juſtices of Peace throughout *England*; and upon this unjuſt and injurious Act, (as commonly in like Caſes it falleth out) a new Office was created, and they made Maſters of the King's Forfeitures. But at the Parliament holden in the Firſt Year of H. VIII. this Act 11, H. VII. is recited, and made void and repealed, and the Reaſon thereof is yielded, for that by Force of the ſaid Act it was manifeſtly known, that many ſiniſter and crafty, feigned and forged Informations, had been purſued againſt divers of the King's Subjects, to their great Damage and wrongful Vexation: And the ill Succeſs hereof, and the fearful End of theſe two Oppreſſors, ſhould deter others from committing the like, and admoniſh Parliaments, that inſtead of this ordinary and precious Trial *per Legem Terræ*, they bring not in abſolute and partial Trials by Diſcretion." In ſhort, whoever will ſupport a Practice of this Nature, ought by no Means to refer to Books of the Law; for the Laws of *England* abhor it, and bear Teſtimony againſt it in every Page. Neither can it be ſupported by advancing new Principles, ſuch as theſe. 1ſt. The common Law extends to the Plantations, but the Statute Law does not. 2dly. The Laws of *England* extend to the Plantations, but the Execution being in the King, he can erect what Courts for the Diſtribution of Juſtice he pleaſes. Principles new as theſe are, unheard, unthought of, before this important Trial between *Thomas Forſey* and *Waddel Cunningham*, one would think needed ſome Proof, ſome Authority at leaſt to eſtabliſh them; for certainly they are not ſelf-evident Propoſitions. But nothing of the Sort have I heard. On the Contrary, it is ſuppoſed by all Civilians, that Colonies carry out with them the Laws of their Mother Country. And if they do, they muſt take thoſe with them, which are in Force at the Time they emigrate, becauſe they are familiar and known. They can never upon their Emigration be obliged to have Recourſe to thoſe Rudiments of Law, which were firſt formed by their Mother Country. They can hardly be ſuppoſed to be ſo well acquainted with Antiquity as to know what they are. Neither can any good Reaſon be given, why they ſhould not reap the Advantages of all the Improvements made by ſucceeding Ages. Beſides, no Man can draw the Line between thoſe Laws which ſtand upon the Authority of Acts of Parliament, and that of the common Law: For many Things are by common Law which firſt commenced by Acts of Parliament; many ſeem

to

to ſtand on the Authority of Acts of Parliament, which were before by common Law. So that this Principle, if adopted, would produce more Confuſion than a ſudden Repeal of all Laws: By theſe Means the Trials by Battle, and Fire Ordeal, would be again introduced. In ſhort it is not poſſible to ſuppoſe that our moſt gracious Sovereign, when by his Inſtructions he directed that the Laws ſhould be adminiſtered in a Method as nearly as poſſible according to the Laws in *England*, intended we ſhould conform to all the Abſurdities of an ignorant Age. No, his gracious Intentions doubtleſs were, that we ſhould enjoy the Benefit of thoſe Laws, which by the Improvement of many Ages were wrought up to the higheſt Perfection, and by this he conferred on us the greateſt Bleſſing which his princely Wiſdom could beſtow, and took the beſt Method of ſecuring the Dependence of the Colonies. So prepoſterous is it to ſuppoſe that it would be ſecured by depriving the People of this Colony of the Laws of *England*.

As for the other Principle, that the King can erect what Courts he pleaſes for the Diſtribution of Juſtice, it is not only contrary to Law, but it is big with the moſt dangerous Conſequences. The King it is true is the Fountain of Juſtice, and the Execution of the Law is in him, by the Conſtitution of *England*; but the Mode of diſpenſing it is fixed by Law, and unalterable, but by Act of Parliament. He may erect as many new Courts as he pleaſes, but they muſt determine according to the Courſe of the common Law, and proceed on Facts found by Juries. But that he can erect Courts which ſhall have a Power to try Cauſes in what Manner they pleaſe, muſt appear extremely ſhocking to an *Engliſh* Ear, and to any one who has the leaſt Idea of the *Engliſh* Conſtitution. This is expreſsly provided againſt by *Magna Charta*, as appears by the Authority juſt now read. On this Principle a Court ſimilar to the Inquiſition might be erected, and Torture introduced. By theſe Means the grand Difference between an *Engliſh* Subject, and a Subject of *France*, or *Spain*, or *Turkey*, would be annihilated; for that conſiſts more in the Mode of adminiſtering Juſtice to them, than in the Laws themſelves. Happy for us we live under a Monarch patriotic and beneficent, who glories in being the Sovereign of Free-Men, not of Slaves; and will reject with Abhorrence every Prerogative which may be exerted to the Ruin of his Subjects. Of this we had an ample Proof, when one of the firſt Acts of his Reign was to ſecure the Independence of the Judges, by parting with what was an undoubted Prerogative of his Crown; and I dare venture to propheſy

that whoever ſeeks to recommend himſelf to his moſt gracious Majeſty's Favour, by undertaking to prove that his Subjects are no better ſecured in their Liberties and Eſtates than thoſe of the moſt abſolute Monarchs, will appear to have taken the worſt Way of making his Court. ——

Before I conclude, as in the Proſecution of this Scheme, not only Juries but the Practiſers of the Law, and the Judges have been treated with Diſreſpect ; Juſtice obliges me to ſay, that I have a pretty general Acquaintance with the Practiſers, eſpecially with thoſe that are moſt eminent, and that from what I have obſerved of their Conduct, I can declare, that I know none who do not behave themſelves with a Candour, Integrity, and Diſintereſtedneſs, which does Honour to their Profeſſion. And of this they have on this Occaſion exhibited a Proof. They ſuppoſe the Appeal now brought illegal and injurious to the Country, and for that Reaſon, not one of them could be prevailed on to give his Aſſiſtance to, but all rejected the Project with Diſdain. This will long be remembered to their Honour.

As for the Judges they or ſome of them are reproached, as forgetting their Duty in endeavouring to raiſe the Paſſions : On which I ſhall obſerve in the Words of a great Lawyer ; that a Judge is not to be defamed or vilified with Reſpect to his Parts, Fitneſs for his Place, &c. for if this were allowed, it would be impoſſible to keep in the People that Veneration for their Perſons, and Submiſſion to their Judgments, without which it is impoſſible to execute the Laws with Vigour and Succeſs. What Grounds there are for accuſing them of raiſing the Paſſions I know not. When ſuch Principles are advanced as tend to overturn a Conſtitution, of which every *Engliſhman* is fond, his Reſentment will naturally be raiſed ; and when the Miſchiefs ariſing from ſuch Principles are either ſhewn or hinted at, his Anger will be ſtill more inflamed. But who ought to be accuſed of raiſing the Paſſions when this is the Caſe, I muſt ſubmit to the ſerious Conſideration of your Honours. Certainly our Duty obliges us to preſent to your Honours a full View of the Inconveniencies which muſt attend this Alteration of the Law.

It does a peculiar Honour to Juries, Lawyers, and Judges, that thoſe who impeach their Conduct, declare againſt the Laws of *England*, that excellent Syſtem which can hardly be conſidered without Admiration, or ſpoke of without Rapture, and which our moſt Gracious King is ſo far from endeavouring to deprive us of, that he has particularly directed his

Governors

Governors to conform to them as much as poſſible, by an Inſtruction, which lately and accidentally came to our Knowledge, whereby his Governor or Commander in Chief, is directed to take Care that no Man's Life, Member, Freehold, or Goods, be taken away or harmed in this Province, otherwiſe than by the eſtabliſhed and known Laws, not repugnant to, but as nearly as poſſible, conformable to the Laws of *England*. This ſhews the Propriety of the Obſervation, that the Judges ought not to be directed in their Duty by ſuch Scraps of Inſtructions as may from Time to Time be communicated to them: For had we been directed in our Conduct by the Thirty-ſecond Inſtruction, and miſunderſtood it, to ſignify an Appeal againſt a Verdict, we ſhould have introduced a Practice, not only contrary to this Inſtruction by which the Laws of *England* are enforced, but to make Uſe of the Words of the Oracle of the Law, contrary to, and in the face of *Magna Charta*. This Inſtruction alone I ſhould imagine would be a ſufficient Inducement to your Honours, to ſupport the Practice of the Law here, in every Thing which is conſonant to the Laws at Home.

The laſt Thing I beg Leave to trouble your Honours with is, an Act of Parliament paſſed in the 4th *Henry* IV. Chap. 23, which runs thus: Whereas, as well in Plea real, as in Plea perſonal, after Judgment given in Courts of our Lord the King, the Parties be made to come upon grievous Pain, ſometime before the King himſelf, ſometime before the King's Council, and ſometimes to the Parliament, to anſwer thereof, of new, to the great impoveriſhing of the Parties aforeſaid, and in the ſubverſion of *the common Law of the Land*. It is ordained and ſtabliſhed, that after Judgment given in the Courts of our Lord the King, the Parties and their Heirs, ſhall be thereof in Peace until Judgment be undone by Attaint, or Error, if there be Errors, as hath been uſed by the Laws in the Times of the King's Progenitors.

This Act I hope will be ſufficient to anſwer the Objections of the moſt ſcrupulous; for it appears not only to be made in order to prevent ſuch Appeals as are now contended for, but alſo in Affirmance of the common Law. So that I confidently expect your Honours will unanimouſly reject this Appeal, and approve of our Conduct.

ROBERT R. LIVINGSTON.

At a Council held at *Fort George* in the City of *New-York*, on Wedneſday the 23d Day of *January*, 1765.

PRESENT,

The Hon. CADWALLADER COLDEN, Eſquire,
Lieutenant Governor, &c.

Mr. WATTS, | Mr. READE,
Mr. DE LANCEY, | Mr. MORRIS.

Waddel Cunningham, against *Thomas Forſey*. } A Petition of *Robert R. Waddel*, was preſented and read, and is in the Words following:

To the Hon. CADWALLADER COLDEN, *Eſq*; *Lieutenant Governor and Commander in Chief of the Province of* New-York, *and Territories depending thereon in* America; *and the Honourable his Majeſty's Council, Judges of the Court of Appeals of the ſaid Province.*

The humble Petition of *Robert Roſs Waddel*, of the City of *New-York*, Merchant, legal Repreſentative of *Waddel Cunningham*, is moſt reſpectfully preſented,

Setting forth,

THAT in an Action of Treſpaſs, Aſſault and Battery, commenced in the Supreme Court of Judicature for ſaid Province, by *Thomas Forſey* againſt *Waddel Cunningham*, a Verdict was given againſt the Defendant, for *One Thouſand and Five Hundred Pounds* Damages, beſides Coſts of Suit, which Damages your Petitioner, who is Attorney for the Defendant, conceiving exceſſive and unreaſonable, deſired the Attorney and Counſel in the Cauſe, to Appeal from the ſaid Verdict unto your Honours, as a Court of Appeals; which was abſolutely refuſed by the ſaid Attorney and Counſel.

That thereupon your Petitioner applied to *George Harriſon*, Eſq; a Notary Public, attending in Court at the Requeſt of your Petitioner, to move the Court for ſuch Appeal, which he did accordingly, requeſting the Court to make a Minute of his Motion, which was refuſed for the preſent; but the Court declared they would conſider of it till next Morning,